TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1921.

No. 258.

CONSOLIDATED GAS COMPANY OF NEW YORK,
APPELLANT,

vs.

CHARLES D. NEWTON, ATTORNEY GENERAL OF THE STATE OF NEW YORK, ET AL.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED MARCH 18, 1921.

(28,165)

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 8, 1921.

1 *Equity Subpœna.*

The President of the United States of America to Charles D. Newton, as Attorney-General of the State of New York; Edward Swann, as District-Attorney of the County of New York, State of New York, and Travis H. Whitney, Charles S. Hervey, and Frederick J. H. Kracke, constituting the Public Service Commission of the State of New York, First District, Greeting:

You are hereby commanded to appear before the Judges of the District Court of the United States of America for the Southern District of New York, in the Second Circuit, to answer a bill of complaint exhibited against you in the said Court in a suit in Equity, by Consolidated Gas Company of New York, and to further do and receive what the said Court shall have considered in this behalf; and this you are not to omit under the penalty on you and each of you of Two Hundred and Fifty Dollars ($250).

Witness, Honorable Learned Hand, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, on the 16th day of January, in the year one thousand nine hundred and nineteen and of the Independence of the United States of America the one hundred and forty-third.

ALEX. GILCHRIST, JR.,
Clerk.

SHEARMAN & STERLING,
Solrs.

The defendants are required to file their answer or other defense in the above cause in the Clerk's office of this Court, on or before the twentieth day after service hereof excluding the day of said service; otherwise the bill aforesaid may be taken pro confesso.

[SEAL.] ALEX. GILCHRIST, JR.,
Clerk.

2 I hereby certify, That on the 17th day of January 1919, at the City of New York, in my district, I personally served the within Subpœna in Equity upon the within named Defendant, Frederick J. H. Kracke as a member of the Public Service Commission of the State of New York, First District by exhibiting to him at #49 Lafayette Street, N. Y. the within original, and at the same time leaving with him a copy thereof.

THOMAS D. McCARTHY,
United States Marshal,
Southern District of New York.

Dated January 22nd, 1919.

R. H. M.

1—258

3 I hereby certify, That on the 18th day of January 1919, at the City of New York, in my District, I personally served the within Subpoena in Equity upon the within named Defendant Travis H. Whitney, as a member of the Public Service Commission of the State of New York, First District, by exhibiting to him at #49 Lafayette St. New York City, N. Y. the within original, and at the same time leaving with him a copy thereof.

THOMAS D. McCARTHY,
United States Marshal,
Southern District of New York.

Dated, January 22nd, 1919.

R. H. M.

4 I hereby certify, That on the 22nd day of January 1919, at the City of New York, in my district, I served the within Subpoena in Equity upon the within named Defendant, Chas. S. Hervey, as a member of the Public Service Commission of the State of New York, First District, by exhibiting to R. H. Randell, as Secretary to Chas. S. Hervey, at #49 Lafayette St. New York City, N. Y., the within original, and at the same time leaving with him a copy thereof.

THOMAS D. McCARTHY,
United States Marshal,
Southern District of New York.

Dated January 22nd, 1919.

R. H. M.

5 I hereby certify, That on the 22nd day of January, 1919, at the City of New York, in my district, I served the within Subpoena in Equity upon the within named Defendant Edward Swann, as District Attorney of New York County by exhibiting to H. W. Foster, as Secy. to Edward Swann at Criminal Court Building, New York City, N. Y. the within original, and at the same time leaving with him a copy thereof.

THOMAS D. McCARTHY,
United States Marshal,
Southern District of New York.

Dated, January 22nd, 1919.

R. H. M.

6 Personally served on Charles D. Newton, Attorney General, State of New York, this 20th day of January, 1919.

CLAYTON L. WHEELER,
U. S. Marshal,
Northern District of New York.
By JOHN J. O'CONNOR,
Deputy.

7 *Bill of Complaint.*

Filed Jan. 16, 1919.

District Court of the United States, Southern District of New York.

In Equity.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Travis H. Whitney, Charles S. Hervey, and Frederick J. H. Kracke, Constituting the Public Service Commission of the State of New York, First District, Defendants.

Bill of Complaint.

To the Honorable the Judges of the District Court of the United States for the Southern District of New York:

The Consolidated Gas Company of New York, a corporation organized and existing under the laws of the State of New York, and having its principal place of business in the County of New York, Borough of Manhattan, City of New York, in the Southern
8 District of New York, brings this its Bill of Complaint against Charles D. Newton, as Attorney-General of the State of New York, Edward Swann, as District Attorney of the County of New York, State of New York, and Travis H. Whitney, Charles S. Hervey and Frederick J. H. Kracke, constituting the Public Service Commission of the State of New York, First District; and thereupon your orator alleges, upon information and belief, and complains:

I. Your orator is a corporation, duly incorporated for the purpose of manufacturing and selling gas in the City and County of New York, under and by virtue of a Consolidation Agreement duly executed on September 29, 1884, pursuant to a statute of the State of New York, entitled, "An Act to Authorize the Consolidation of Manufacturing Corporations," known as Chapter 367 of the Laws of 1884. The said Consolidation Agreement was executed by the New York Gas Light Company, The Manhattan Gas Light Company, The Metropolitan Gas Light Company of the City of New York, The Municipal Gas Light Company of New York, The Knickerbocker Gas Light Company and The Harlem Gas Light Company, all of which were corporations theretofore duly organized and existing under the laws of the State of New York, with the property, powers and franchises hereinafter referred to. The said Agreement was thereafter duly filed in the offices of the Secretary of State of the State of New York and of the Clerk of New York County, on November 10, 1884, pursuant to the said statute. Your orator was duly or-

ganized as a corporation thereunder, to continue for fifty years, by virtue of the said Consolidation Agreement and of the aforesaid statute; but, under the laws of New York, its corporate existence may, at any time, be extended, upon the consent of two-thirds in amount of the stockholders.

II. By virtue of the said Consolidation Agreement, your orator became the owner of various franchises or consents, duly ob-
9 tained by its said predecessor companies, authorizing them to lay, maintain and operate mains, pipes and conductors in the streets, highways and public places of the City and County of New York; and it further became the owner of, and entitled to maintain and operate, mains, pipes and conductors theretofore laid in the various streets, highways and public places in the said City and County of New York by the said predecessor companies; and it also became thereby the owner of large and expensive works for the manufacture and distribution of gas, which had been erected by the said various predecessor companies. Your orator has, ever since, been engaged in the business of manufacturing and selling gas to the inhabitants of the said City and County of New York and to The City of New York, and has maintained and operated the said mains, pipes and conductors in the said streets, highways and public places of the said City and County of New York, and has laid additional mains, pipes and conductors therein. Your orator is required by law, under all buildings and premises within one hundred feet of any mains laid by it and to furnish gas meters to its consumers without rent or charge.

III. The defendant, Charles D. Newton, is now the Attorney-General of the State of New York, and resides in Geneseo, State of New York.

IV. The defendant, Edward Swann, is the District Attorney of the County of New York, State of New York, and resides in the Borough of Manhattan, City of New York.

V. The defendants, Travis H. Whitney, Charles S. Hervey and Frederick J. H. Kracke, constitute the Public Service Commission of the State of New York, for the First District, which includes the City of New York, and are now acting as such Commissioners, having been duly appointed under and by virtue of the provisions of Chapter 48 of the Consolidated Laws of the State of New
10 York, prescribing their powers and providing for the regulation of certain public service corporations, including your orator. The said defendants are citizens of the State of New York and reside in the Borough of Brooklyn, City of New York.

VI. On May 1, 1906, your orator exhibited in the Circuit Court of the United States, for the Southern District of New York, its bill of complaint against Julius M. Mayer, as Attorney-General of the State of New York, William Travers Jerome, as District Attorney of New York County, and Frederic E. Gunnison, John C. Davies and

Lucian L. Shedden, constituting the New York State Commission of Gas and Electricity, and The City of New York, whereby your orator sought to have Chapters 736 and 737 of the Laws of 1905, and Chapter 125 of the Laws of 1906 of the State of New York, and also a certain order of the Commission of Gas and Electricity of the State of New York, dated February 23, 1906, declared illegal and void, because in contravention of the Fourteenth Amendment to the Constitution of the United States and of Section 10 of Article 1 of said Constitution; and your orator further prayed that writs of injunction might issue out of said Court, restraining each of the defendants from enforcing the said Acts and order against your orator, and for other and further relief, as in said bill of complaint more fully set forth.

VII. The defendants named in said bill of complaint were duly served with process and duly appeared and, respectively, filed answers in said cause. Thereafter, said cause was duly heard; and on April 3, 1908, there was filed in said Court a final decree, adjudging and decreeing that the complainant, your orator herein, was entitled to the relief prayed for, and granting the writs of permanent injunction prayed for in said bill of complaint.

VIII. Prior to the said final decree of the Circuit Court, William
S. Jackson, successor to the said Julius M. Mayer, was duly
11 substituted as a party defendant, as Attorney-General of the State of New York; and William R. Willcox, William McCarroll, Edward M. Bassett, Milo R. Maltbie and John E. Eustis, constituting the Public Service Commission of the State of New York for the First District, were duly substituted as parties defendant for said Frederic E. Gunnison, John C. Davies and Lucian L. Shedden, constituting the New York State Commission of Gas and Electricity.

IX. Thereafter, an appeal from the said decree was duly taken to the Supreme Court of the United States by the defendants; and the said decree was by that Court reversed and the cause remanded to the said Circuit Court, with directions to dismiss the bill without prejudice; and pursuant to the mandate of the Supreme Court, the said cause was redocketed in said Circuit Court for the Southern District of New York; and on or about February 13, 1909, a decree was duly entered in said Court dismissing said bill of complaint without prejudice, in accordance with the opinion of the said Supreme Court.

X. The said decision of the Supreme Court was upon the ground that, although a return of less than 6 per cent upon the value of its property would be confiscatory and although the finding of the lower Court, as modified by the Supreme Court, indicated that your orator would earn less than six per cent., yet the margin between possible confiscation and valid regulation was so close that it failed to show clearly and unmistakably that the rate of eighty cents per thousand cubic feet prescribed by said Act of 1906 would not afford

your orator a fair and reasonable return upon the value of its property, especially in view of the fact that the said rate had never been in effect and the results upon the revenue of your orator under said rate were conjectural. The Supreme Court, in its said opinion (212 U. S., 19), recognized the constitutional right of your orator
12 to receive a return of at least six per cent. on the fair value of its property devoted to the public use, but said that it was desirable that there should be a practical test to determine the sufficiency or insufficiency of the return, and that if such test should show that your orator could not obtain a fair return under said rate, your orator should have the opportunity to again present its case to the Court; and to that end, the decree was reversed, with directions to dismiss the bill without prejudice.

XI. By said Chapter 125 of the Laws of 1906 of the State of New York, it is provided, that no corporation engaged in the business of manufacturing, furnishing or selling illuminating gas in the Borough of Manhattan, or in the Borough of The Bronx, in the City of New York, except in that portion thereof contained in the former towns of Eastchester and Pelham and in the former town of Westchester outside the Villages of Wakefield and Williamsbridge, shall charge for gas manufactured, furnished or sold by it to the public a sum in excess of eighty cents per thousand cubic feet. The said Act provides that any corporation violating any provision thereof shall forfeit to the people of the State the sum of one thousand dollars for each offense.

XII. The value of your orator's property devoted to its gas business as of December 31, 1905, as found by the United States Circuit Court in the said former suit to review the said eighty cent law, as modified by the said decision of the Supreme Court of the United States, was $55,612,435. There has since then been added thereto, property which has cost your orator not less than $14,085,265, making the total value under normal conditions of your orator's property presently devoted to its gas business at least $69,697,700; and the cost of reproducing said property at the present time would greatly exceed that amount. In addition thereto, your orator is
13 possessed of going value and other intangible assets of great value, many of which were omitted from the valuation of your orator's property in said former suit in the United States Circuit Court, which have since been recognized by the Courts and State Commissions as reasonable and proper; and there now exists an aggregate deficiency in your orator's earnings below six per cent., since the date the said eighty cent rate was made effective, in the amount of at least $12,000,000, which said sum should be added to the value of your orators's tangible property above stated, as going value, upon which your orator is entitled to a return.

XIII. During the year ending October 31, 1918, the gross operating revenues from your orator's gas business amounted to $15,764,288.11, and the cost of manufacturing and distributing said gas, together with taxes and other operating expenses, amounted to

5,665,046.46, leaving a net income from the business operation your orator of only $99,241.65, which is less than one-fourth of per cent. on the value of your orator's investment, as herein- ore set forth, and which represents a return of six per cent upon rincipal sum of only $1,654,027.

The present value of your orator's investment, based upon the l eighty-cent gas case, exclusive of going value and other in- gible property, is, as above stated, not less than $69,697,700. e principal sum upon which a return of six per cent. is earned is, above stated, $1,654,027; and the minimum value of the prop- y upon which your orator is deprived of any return by the said t of 1906 is not less than $68,043,673, while the maximum value reof, based upon the present cost of reproduction of said prop- y, is a much greater amount.

A return of only six per cent. upon the minimum value aforesaid your orator's investment in its gas properties would amount to less than $1,181,862 per annum, or 23.29 cents per thousand ic feet of gas sold. The said net earnings of $99,241.65 for the r ending on October 31, 1918, amounted to only 55/100s of cent per thousand cubic feet of gas sold. The deficiency in your orator's earnings during the said year below six per cent on the minimum value of your orator's said investment amounted to $1,082,620.35, or 22.74 cents per thousand cubic feet of sold; and this deficiency is caused directly and solely by the ar- rarily restricted price at which your orator is compelled by the te of New York to supply gas to your orator's customers.

Your orator's average daily sales during the winter months amount 2,728,800 cubic feet, which, at 22.74 cents per thousand, estab- es as your orator's present daily loss, by reason of the said utory rate, the sum of $14,264.53 per day, which loss your orator by no possible means recover. This continuing daily loss is in dition to the deficiency of $1,082,620.35 in your orator's earnings ring the year ended October 31, 1918.

XIV. The cost of manufacturing and distributing gas has greatly reased since the said former decree, by reason of the increase in cost of coal, enriching oil and all other materials used in the nufacture and distribution of gas, in the large advance in the ges of employees, and in the increase in taxes; and there is a cer- nty that there will be a very substantial increase in such cost in year 1919.

XV. The value of money has greatly depreciated and is now far than at the time of said former decree; and the purchasing power a dollar at the present time is the equivalent of only about sixty ts at the time of said decree; so that an investor who might now ive ten per cent. upon his investment would not receive more n an investor in 1909 who received six per cent. upon his in- tment. A return or profit of six per cent. upon your orator's estment in its said plant and property is, therefore, no longer a , reasonable and adequate return upon such investment.

While the value of the dollar received by the stockholder has decreased as stated herein, the present cost of the property or similar property devoted to the public service has greatly increased;
15 the result being that the owners of it, while receiving a return in a decreased purchasing power dollar are devoting a very greatly increased present cost investment to the public service.

XVI. The said rate of eighty cents per thousand cubic feet has, during the past year, practically deprived your orator of any return whatever upon the reasonable value of its property devoted to the manufacture and distribution of gas as aforesaid; and, at no time since the said rate went into effect, has it permitted your orator to earn a fair return thereon; and the said Act is in violation of Section 10 of Article I of the Constitution of the United States, in that it impairs the obligation of your orator's contract with the State of New York; and it is also in violation of the Fourteenth Amendment to the Constitution of the United States, in that it deprives your orator of its property without due process of law and denies to it the equal protection of the laws.

XVII. Your orator is advised by counsel, and verily believes, that the said Public Service Commission of the State of New York, for the First District, has no power to permit your orator to increase the rate which it may charge for gas supplied, in excess of the maximum rate of eighty cents per thousand cubic feet prescribed by the said Act of 1906. If your orator should so attempt to increase its said rate, it would be unable to collect the same; for it is provided by the said Chapter 48 of the Consolidated Laws of the State of New York, that the charging by any gas company of any rate in excess of that permitted by law, shall be a complete defense to any action by such company against any consumer for any unpaid bill. Furthermore, it would be the duty of the defendants herein, Charles D. Newton, as Attorney-General of the State of New York, and Edward Swann, as District-Attorney of the County of New York, State of New York, to prosecute your orator for each such violation of law and to endeavor to enforce and collect the enormous penalties prescribed by said law; and it would be the duty of
16 the defendants, Travis H. Whitney, Charles S. Hervey and Frederick J. H. Kracke, to cause suits in mandamus or for injunction to be brought against your orator under Section 74 of said Chapter 48 of the Consolidated Laws of New York, for the purpose of preventing your orator from so increasing its rates.

XVIII. Your orator now has more than 498,660 customers in the City and County of New York, to whom it is daily selling and distributing gas. The amount so sold and distributed during the year ending October 31, 1918, was 17,952,959,800 cubic feet. Many of said customers are financially irresponsible and only temporary residents of New York. Monthly bills for gas are rendered to such customers by your orator, and unless such bills are promptly paid, the supply of gas to delinquent customers is discontinued by your orator, as authorized by law. If your orator should make a charge

to any customer, in excess of the statutory rate of eighty cents per thousand cubic feet, your orator is informed and believes that such consumer would refuse to pay such charge, upon the pretext that the making of such charge is a complete defense to your orator's entire claim against such consumer. If your orator should thereupon discontinue service to such consumers and remove the meters, your orator is advised and believes that it would be at once subjected to a multiplicity of suits from such consumers, to compel the restoration of such meters and service, as well as to prosecutions for the fines and penalties prescribed by said Act, which prescribes a penalty of $1,000 for each separate charge to any consumer in excess of the said statutory rate of eighty cents per thousand cubic feet. If your orator should make a charge in excess of said eighty cent rate each month to each of its consumers, the aggregate of the penalties so incurred in one year would amount to over $5,983,920,000, and the damage to your orator would be irreparable and absolutely
destructive of all its assets, franchises and property; and a
17 refusal or failure to observe and comply with said statute,
if only for the purpose of having the same tested in good faith in a court of law, would involve a risk of absolute ruin to your orator and the entire destruction and confiscation of its property, by reason of the enormous fines for which it would be the duty of the defendants Newton and Swann to institute suit, in accordance with the requirements of Section 1962 of the Code of Civil Procedure of the State of New York. Your orator is, therefore, without adequate remedy at law for the redress of the wrongs suffered by the enforcement of said confiscatory rate and the enforcement of said Act of 1906; and such injury to your orator is irreparable except through the intervention of a court of equity.

XIX. The value of the business and property of your orator which is involved in this suit is greatly in excess of $3,000.

XX. To the end that your orator may have that relief which it can only obtain in a court of equity and that the defendants may each answer the premises, but not under oath or affirmation, the benefit whereof is hereby expressly waived by your orator, it hereby prays:

1. That it be adjudged and decreed that said Chapter 125 of the Laws of 1906 is illegal and void, because in contravention of Section 10 of Article I and the Fourteenth Amendment of the Constitution of the United States, as aforesaid.

2. That it be adjudged and decreed that your orator has no adequate remedy at law for the injury which will result from the further enforcement of said Act and that such injury will be irreparable.

3. That it be adjudged and decreed that your orator be granted a writ of permanent injunction, issuing out of and under the seal of this Honorable Court, against the defendants, restraining them and

each of them and each of their officers, agents, servants and employees and any and every person acting under and by virtue of the authority of the said Act, from in any way enforcing or attempting to enforce the provisions of said Act of 1906 against your
18 orator, or from bringing any actions thereunder to enforce the said penalties against your orator, or from bringing any actions in mandamus or for an injunction in any court whatsoever, for the purpose of compelling compliance by youd orator with said Act.

4. Your orator further prays that it have such other, further or different relief as to the Court may seem meet and the nature of the case may require.

5. Your orator further prays that your Honors grant unto your orator a writ of supœna ad respondendum, issuing out of and under the seal of this Honorable Court, to be directed to the said defendants, commanding them and each of them on a certain day and under a certain penalty to be therein inserted, to appear before your Honors in this Honorable Court, and then and there full, true, direct and perfect answer to make to all and singular the premises, and further to stand, do, perform and abide by such further order and decree as to your Honors may seem meet.

And your orator will ever pray, etc.

CONSOLIDATED GAS COMPANY OF NEW YORK,
By GEORGE B. CORTELYOU,
President.

SHEARMAN & STERLING,
Solicitors for Complainant.

55 Wall Street, New York.

JOHN A. GARVER,
Of Counsel.

19 UNITED STATES OF AMERICA,
Southern District of New York,
County of New York:

George B. Cortelyou, being duly sworn, says that he is the President of the Consolidated Gas Company of New York, the complainant named in the foregoing bill of complaint, and has subscribed to the same, and that the same is true to his own knowledge, except as to the matters therein stated to be alleged on information and belief and that, as to those matters, he believes it to be true.

GEO. B. CORTELYOU.

Sworn to before me, January 16, 1919.

M. A. COSS,
Commissioner of Deeds.

N. Y. County Clerk's No. 255.
Commission expires Sept. 18, 1919.

20 *Answer of Attorney General.*

District Court of the United States Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Travis H. Whitney, Charles S. Hervey, and Frederick J. H. Kracke, Constituting the Public Service Commission of the City of New York, First District, Defendants.

The defendant, Charles D. Newton, Attorney-General of the State of New York, one of the defendants above named, answering the bill of complaint, states as follows:

I. Denies any knowledge or information thereof sufficient to form a belief as to the allegations set forth in Paragraph "II" of the bill of complaint herein which alleges that

"By virtue of the said Consolidation Agreement, your orator became the owner of various franchises or consents, duly obtained by its said predecessor companies, authorizing them to maintain and operate mains, pipes and conductors in the streets, highways, and public places of the City and County of New York; and it further became the owner of, and entitled to maintain and operate mains, pipes and conductors theretofore laid in the various streets, highways and public places in the said city and county of New York by the said predecessor companies; and it also became thereby the owner of large and expensive works, for the manufacture and distribution of gas, which had been erected by the said various predecessor companies."

21 II. In answer to the allegation set forth in Paragraph "X" of the bill of complaint, alleges that the decision of the Supreme Court of the United States speaks for itself and said defendant does not admit fully the construction placed upon said decision by complainant as alleged in said paragraph.

III. Denies any knowledge or information thereof sufficient to form a belief as to the allegations set forth in Paragraph "XII" of the bill of complaint herein which alleges that

"The value of your orator's property devoted to its gas business as of December 31, 1905, as found by the United States Circuit Court in the said former suit to review the said eighty cent law, as modified by the said decision of the Supreme Court of the United States, was $55,612,435. There has since then been added thereto, property which has cost your orator not less than $14,085,265,

making the total value under normal conditions of your orator's property presently devoted to its gas business at least $69,697,700; and the cost of reproducing said property at the present time would greatly exceed that amount. In addition thereto your orator is possessed of going value and other intangible assets of great value, many of which were omitted from the valuation of your orator's property in said former suit in the United States Circuit Court, which have since been recognized by the Courts and State Commissions as reasonable and proper; and there now exists an aggregate deficiency in your orator's earnings below six per cent. since the date the said eighty cent rate was made effective, in the amount of at least $12,000,000, which said sum should be added to the value of your orator's tangible property above stated, as going value, upon which your orator is entitled to a return."

22 IV. Denies any knowledge or information thereof sufficient to form a belief as to the allegations set forth in Paragraph "XIII" of the bill of complaint herein which alleges that

"During the year ending October 31, 1918, the gross operating revenues from which your orator's gas business amounted to $15,764,288.11, and the cost of manufacturing and distributing said gas, together with taxes and other operating expenses, amounted to $15,665,046.46, leaving a net income from the business operation of your orator of only $99,241.65, which is less than one-fourth of one per cent on the value of your orator's investment, as hereinbefore set forth, and which represents a return of six per cent. upon a principal sum of only $1,654,027.

The present value of your orator's investment, based upon the said eighty cents gas case, exclusive of going value and other intangible property, is, as above stated, not less than $69,697,700. The principal sum upon which a return of six per cent is earned is, as above stated, $1,654,027; and the minimum value of the property upon which your orator is deprived of any return by the said Act of 1906 is not less than $68,043,673, while the maximum value thereof, based upon the present cost of reproduction of said property, is a much greater amount.

A return of only six per cent. upon the minimum value aforesaid of your orator's investment in its gas properties would amount to not less than $4,181,862 per annum, or 23.29 cents per thousand cubic feet of gas sold. The said net earnings of $99,241.65 for the year ending on October 31, 1918, amounted to only 55-100's of one per cent per thousand cubic feet of gas sold. The deficiency in your orator's earnings during the said year below six per cent on the minimum value of your orator's said investment amounted to $4,082,620.35, or 22.74 cents per thousand cubic feet of gas sold; and this deficiency is caused directly and solely by the arbitrarily restricted price at which your orator is compelled by the State of New York to supply gas to your orator's customers.

23 Your orator's average daily sales during the winter months amount to 62,728,800 cubic feet, which at 22.74 cents per

thousand, establishes as your orator's present daily loss, by reason of the said statutory rate, the sum or $14,264.53 per day, which loss your orator can by no possible means recover. This continuing daily loss is in addition to the deficiency of $1,082,620.35 in your orator's earnings during the year ended October 31, 1918."

V. Denies any knowledge or information thereof sufficient to form a belief as to the allegations set forth in Paragraph "XIV" of the bill of complaint herein, which alleges that

"The cost of manufacturing and distributing gas has greatly increased since the said former decree, by reason of the increase in the cost of coal, enriching oil and all other materials used in the manufacture and distribution of gas, in the large advance in the wages of employees, and in the increase in taxes; and there is a certainty that there will be a very substantial increase in such cost in the year 1919."

VI. Denies any knowledge or information thereof sufficient to form a belief as to the allegations set forth in Paragraph "XV" of the bill of complaint herein, which alleges that

"The value of money has greatly depreciated and is now far less than at the time of said former decree; and the purchasing power of a dollar at the present time is the equivalent of only about sixty cents at the time of said decree; so that an investor who might now receive ten per cent upon his investment would not receive more than an investor in 1909 who received six per cent upon his investment. A return of profit of six per cent upon your orator's investment in its said plant and property is, therefore, no longer a fair, reasonable and adequate return upon such investment.

While the value of the dollar received by the stockholder has decreased as stated herein, the present cost of the property or
24 similar property devoted to the public service has greatly increased; the result being that the owners of it, while receiving a return in a decreased purchasing power dollar are devoting a very greatly increased present cost of investment to the public service."

VII. Denies any knowledge or information thereof sufficient to form a belief as to the allegations set forth in Paragraph "XVI" of the bill of complaint herein which alleges that

"The said rate of eighty cents per thousand cubic feet has, during the past year, practically deprived your orator of any return whatever upon the reasonable value of its property devoted to the manufacture and distribution of gas as aforesaid; and, at no time since the said rate went into effect, has it permitted your orator to earn a fair return thereon; and the said Act is in violation of Section 10 of Article 1 of the Constitution of the United States, in that it impairs the obligation of your orator's contract with the State of New York; and it is also in violation of the Fourteenth Amendment to the Constitution of the United States, in that it deprives your ora-

tor of its property without due process of law and denies to it the equal protection of the laws."

VIII. Denies any knowledge or informations thereof sufficient to form a belief as to so much of the Allegations set forth in Paragraph "XVIII" of the bill of complaint which alleges that complainant has more than 198,000 customers in the city and county of New York to whom it is daily selling and distributing gas, and that the amount so sold and distributed during the year ending October 31st, 1918 was 17,952,959,800 cubic feet and that many customers are financially irresponsible and only temporary residents of New York and the damage to your orator would be irreparable and absolutely destructive of all its assets, franchises and property; and a refusal or failure to observe and comply with said statute, if only for the purpose of having the same tested in good faith in a court of law, would involve a risk of absolute ruin to your orator and the entire destruction and confiscation of its property, by reason of the enormous fines, and that your orator is therefore without adequate remedy at law for the redress for the wrongs suffered by the enforcement of said confiscatory rate and the enforcement of said Act of 1906, and such injury to your orator is irreparable except through the intervention of a court of equity.

IX. Denies upon information and belief so much of the allegation contained in Paragraph "XX" of the bill of complaint herein which alleges that complainant may obtain relief only in a court of equity.

X. Denies upon information and belief that the operation of said chapter 125 of the laws of 1906 would cause the complainant to suffer irreparable loss or the destruction of its property rights for the reasons set forth in said bill of complaint, and said defendant denies that there is no remedy except in equity to test adequately and completely the said act.

XI. Alleges upon information and belief that the rate or rates provided for in said chapter 125 of the laws of 1906 are reasonable and not confiscatory and would not deprive complainant of its property without due process of law, and does not deny it the equal protection of the law; that said Act is not in violation of Section 10 of Article I of the Constitution of the United States, and that it does not deprive complainant of the liberty of contract.

XII. Denies upon information and belief that the rates fixed by chapter 125 of the laws of 1906 referred to in the bill of complaint are unreasonable and unjust and cannot be continued in effect without irreparable injury to the complainant or the destruction of its property rights and interests.

XIII. Alleges upon information and belief that the prices fixed by said chapter 125 of the laws of 1906 gives a fair and reasonable return to complainant on the capital invested in its business.

XIV. Alleges upon information and belief that all and every of the matters in said complainant's bill of complaint are matters which may be tried and determined at law and with respect to which the said complainant is not entitled to any relief in a court of equity.

Wherefore, said defendant asks that the bill of complaint herein be dismissed with costs.

Dated, Albany, N. Y., February 5th, 1919.

CHARLES D. NEWTON,
Attorney-General of the State of New York, Defendant.

Office & P. O. Address, Capitol, Albany, N. Y.

WILBER W. CHAMBERS,
Deputy Attorney-General, Solicitor for said Defendant, Charles D. Newton, Attorney General of State of New York.

Office and P. O. Address, Capitol, Albany, N. Y.

27 UNITED STATES OF AMERICA,
State of New York,
City and County of Albany, ss:

Charles D. Newton, being duly sworn, deposes and says: I am the Attorney-General of the State of New York and one of the defendants herein. I have read the foregoing answer and know the contents thereof and the same is true.

CHARLES D. NEWTON.

Sworn to before me thic 7th day of February, 1919.

WM. THOMAS,
Notary Public.

(Endorsed:) U. S. District Court, S. D. of N. Y., Filed Feb. 8, 1919.

28 *Answer of Edward Swan, District Attorney.*

District Court of the United States, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York; Travis H. Whitney, Charles S. Hervey, and Frederick J. H. Kracke, Constituting the Public Service Commission of the State of New York, First District, Defendants.

The District Attorney of the County of New York, State of New York, by William P. Burr, his solicitor herein, alleges:

First. Your orator denies that he has any knowledge or information sufficient to form a belief as to each and every allegation contained in the paragraphs of the bill of Complaint marked and numbered "I," "II," "XIII," "XIV," "XV," "XVI" and "XVIII," except that your orator admits that the complainant is a corporation organized under the laws of the State of New York, and is engaged in the business of manufacturing and distributing illuminating gas for public and private consumption.

Second. Upon information and belief, your orator denies each and every allegation in the paragraph of the bill of complaint marked and numbered "X" except that your orator admits that the
29 complainant herein is entitled to a fair return upon a fair value of its property actually engaged in public service, proper deductions and allowances being made in any event for depreciation in said property. Your orator alleges that the cost of reproducing said property is not a fair, reasonable or true guide to the determining of the fair value of said property. Your orator further admits in connection with the allegations of paragraph marked and numbered "X" that complainant's bill of complaint in the former action, referred to in said paragraph, was dismissed by the Supreme Court of the United States without prejudice and until a fair trial and an experiment could be had with the rates provided by Chapters 736 and 737 of the Laws of 1905 and Chapter 125 of the Laws of 1906 of the State of New York. Your orator alleges that the complainant herein has been experimenting with the rates provided by said statutes for a period of over ten years and that therefore said complainant has been guilty of delay and laches in asserting that it has not received an adequate return from the said rates since their establishment by statute, and in this respect has slept on its rights, if it had any in the premises, for an unreasonable length of time. That furthermore, your orator alleges that the Supreme Court of the United States did not decide in its said decision that the complainant was at all times entitled to six per cent upon the fair value of its property actually engaged in the public service and further avers that there is no fixed rate of return that a public service corporation may at all times, and under all circumstances, be entitled to receive, but that the true determination thereof depends in each case, upon the peculiar circumstances of that case.

30 Your orator further alleges and avers, upon information and belief, that the complainant is the owner of record and beneficial owner of numerous and large parcels of land engaged in the public service as well as land not so engaged. That the complainant is not entitled to include in the value of the rate base claimed by it in the paragraph of the bill of complaint herein marked and numbered "XII" any value as to land not actually engaged in the public service, nor any buildings and property not so engaged. That moreover, the land actually engaged in the public service has an excessively high market value, due to community and social demands alone, and it is upon these values that the complainant asks a return. That your orator prays that your honorable Court will deduct from any claimed market value of the land in question

this excess of value and give to it only such value as it is fair and reasonably worth regarded as land devoted to public service.

Third. Upon information and belief, your orator denies so much of the allegation contained in Paragraph marked and numbered "XX" of the bill of complaint herein which alleges that complainant may obtain relief only in a court of equity.

Fourth. Upon information and belief, your orator denies that the operation of said Chapter 125 of the Laws of 1906 would cause the complainant to suffer irreparable loss or the destruction of its property rights for the reasons set forth in said bill of complaint,
31 and said defendant denies that there is no remedy except in equity to test adequately and completely the said act.

Fifth. Upon information and belief, your orator avers that the rate or rates provided for in said Chapter 125 of the Laws of 1906 are reasonable and not confiscatory and would not deprive complainant of its property without due process of law, and does not deny it the equal protection of the law; that said Act is not in violation of Section 10 of Article I of the Constitution of the United States, and that it does not deprive complainant of the liberty of contract.

Sixth. Upon information and belief, your orator denies that the rates fixed by Chapter 125 of the Laws of 1906 referred to in the bill of complaint are unreasonable and unjust and cannot be continued in effect without irreparable injury to the complainant or the destruction or denial of its property rights and interests or any of them.

Seventh. Upon information and belief, your orator alleges that the prices fixed by said Chapter 125 of the Laws of 1906 gives a fair and reasonable return to complainant on the fair value of its property used in the public service.

Eighth. Upon information and belief, your orator alleges that all and every of the matters in said complainant's bill of complaint are matters which may be tried and determined at law or by peti-
32 tion directed to the Legislature of the State of New York and with respect to which the said complainant is not entitled to any relief in a court of equity.

Ninth. Upon information and belief, your orator avers that the said complainant has not, during the past two years, furnished continuously and with a fair degree of uniformity to its consumers gas, of a candle power having the standard of illumination provided by the statute of the State of New York known as 22 candle power and that the gas so furnished by said complainant was for substantial periods of time during the two years named deficient in heat units, wherein and whereby the said complainant has in effect compelled its public and private consumers to pay a rate for heat and illuminating power greater than that fixed by the said statute, which the complainant now attacks as non-compensatory.

Wherefore, your orator prays that the said bill of complaint be dismissed with costs.

WILLIAM P. BURR,
Corporation Counsel, Solicitor for Edward Swann, District Attorney of New York County, State of New York.

Office and Post Office Address: Municipal Building, Borough of Manhattan, New York City.

33 United States District Court, Southern District of New York, ss.

Edward Swann, being duly sworn, deposes and says: That he is District Attorney of the County of New York, State of New York, and is one of the defendants named in the Bill of Complaint in this action; that he has read the foregoing Answer and knows the contents thereof; that the same is true of his own knowledge, except those allegations made upon information and belief, and as to them, he believes it to be true.

EDWARD SWANN.

Sworn to before me this 23rd day of May, 1919.
HORACE W. FOSTER,
Notary Public, New York County.

New York County Clerk's No. 93.
New York County Register's No. 10006.
Commission Expires March 20th, 1920.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed May 24, 1919.

34 *Answer of Defendant Commissioners.*

District Court of the United States, Southern District of New York.

In Equity.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Travis H. Whitney, Charles S. Hervey, and Frederick J. H. Kracke, Constituting the Public Service Commission of the State of New York, First District, Defendants.

The above named defendants, Travis H. Whitney, Charles S. Hervey and Frederick J. H. Kracke, constituting the Public Service Commission of the State of New York, First District, by Godfrey

Goldmark, their Solicitor, hereby jointly and severally answer the bill of complaint herein as follows:

I.

Answering Paragraph I of said bill of complaint these defendants admit that the complainant is a corporation incorporated for the purpose of manufacturing and selling gas in the City and County of New York under and by virtue of a Consolidation Agreement executed on September 29, 1884 by and on behalf of the several corporations to such purpose and effect as set forth in the said paragraph of said bill of complaint. These defendants admit that said agreement was filed in the office of the Secretary of State of the State of New York and with the Clerk of New York County; and that the complainant was organized as a corporation thereunder for the period and with the right to extend its corporate existence as set forth in said paragraph in said bill of complaint.

II.

Answering Paragraph II of said bill of complaint these defendants are without knowledge as to whether by virtue of said Consolidation Agreement the complainant became the owner of various mains, pipes and conductors therefor in the streets highways and public places in the City and County of New York; and as to whether it further became the owner of all mains, pipes and conductors theretofore laid in said streets by the said predecessor companies; and as to whether the complainant also thereby became the owner of large and extensive works for the manufacture and distribution of gas which had been erected by the said various predecessor companies and these defendants therefore deny said allegations. These defendants admit that the complainant has ever since been engaged in the business of manufacturing and selling gas to the inhabitants of the City and County of New York and The City of New York; and has laid additional mains, pipes and conductors therein. These defendants are without knowledge as to whether by virtue of said Consolidation Agreement and otherwise the complainant became the owner of various franchises or consents obtained by its predecessor companies authorizing them to lay, maintain and operate mains, pipes and conductors in the streets, highways and public places in the City and County of New York, and these defendants therefore deny said allegations.

III.

Answering the allegations of Paragraph X of said bill of complaint these defendants deny the allegations thereof and allege that the decision of the Supreme Court of the United States was that the complainant's bill of complaint filed on May 1, 1906 should be dismissed without prejudice. These defendants admit that prior to said decision said Supreme Court ren-

dered an opinion reported in 212 U. S. Reports at page 19. These defendants deny that the contents of said opinion are correctly set forth in said Paragraph X of the bill of complaint herein. These defendants further allege that what a court decides is determined by its judgment and mandate and that the only determination by the said United States Supreme Court was its judgment and mandate that the bill of complaint filed by the complainant on May 1, 1906 should be dismissed without prejudice.

IV.

Answering the allegations of Paragraph XII of said bill of complaint these defendants deny that the value of the complainant's property devoted to its gas business as of December 31, 1905 as found by the United States Circuit Court in the said former suit to review the Eighty-Cent Gas Law as modified by the said decision of the Supreme Court of the United States was the sum of $55,612,435 and these defendants deny that the said United States Supreme Court made any finding whatever as to the value of the complainant's property devoted to its gas business as of December 31, 1905 or as of any other date whatever. These defendants deny that since December 31, 1905, or since the said decision of the Supreme Court of the United States, there has been added to the property devoted to the company's gas business property which has cost the complainant as much as $14,085,265. These defendants deny that the total value under normal conditions of the company's property presently devoted to its gas business is as much as
37 $69,697,700. These defendants are without knowledge as to whether the cost of reproducing said property at the present time will greatly exceed that amount and therefore they deny said allegation. These defendants deny that the complainant is possessed of any going value or of any other intangible assets of any value. These defendants deny that any assets of complainant were omitted from the valuation of complainant's property in the said former suit in the United States Circuit Court, but these defendants allege that the decree of the United States Circuit Court finding the value of complainant's property at the time of the commencement of the former suit was reversed by the United States Supreme Court. The defendants deny that there now exists in the company's earnings under the Eighty-Cent rate a deficiency of $12,000,000 below a six per cent return, or any deficiency whatsoever. These defendants allege that the complainant during said period has secured reimbursement for the entire expense of manufacturing and distributing gas and earned more than six per cent per annum on the fair value of property used in such manufacture and distribution. During the greater portion of this period, as defendants are informed and believe, the complainant has paid to its stockholders dividends of six or seven per cent a year, and has in addition accumulated and invested profits aggregating not less than $22,000,000, besides setting aside reserves for the protection of its property investment and the net income therefrom aggregating

not less than $15,000,000. Such undistributed profits and reserves do not include the large reserves and surpluses of electrical companies controlled by the complainant. These defendants deny that the said sum of $12,000,000 or any sum should be added to the value of the complainant's tangible property as going value.

38 V.

Answering the allegations of Paragraph XIII of said bill of complaint these defendants are without knowledge as to whether during the year ending October 31, 1918 the gross operating revenues from the complainant's gas business amounted to $15,764,288.11 and as to whether the cost of manufacturing and distributing said gas together with taxes and other expenses amounted to $15,665,046.46 and as to whether the net income from the business operation of the complainant was only $99,241.65, and therefore these defendants deny said allegations. These defendants deny that a net income of $99,241.65 is less than one-fourth of one per cent of the value of the complainant's investment.

These defendants deny that the present value of the complainant's investment based upon said eighty-cent gas case or upon any fair valuation is as much as $69,697,700, whether exclusive of alleged going value and other intangible property, or otherwise. These defendants deny that the principal sum upon which a return of six per cent was earned by the complainant in 1918 was as little as $1,654,027; and they deny that the complainant is deprived of any return by the said act of 1906 upon the fair value of the property of the plaintiff employed in the public service of manufacturing and distributing gas. These defendants are without knowledge as to whether the net earnings of $99,241.65 for the year ending October 31, 1918 amounted to only 55/100ths of one per cent per thousand cubic feet of gas sold and therefore these defendants deny said allegation. These defendants deny each and all the other allegations contained in said Paragraph XIII of said bill of complaint.

39 VI.

Answering the allegations of Paragraph XIV of said bill of complaint these defendants deny the allegations of said paragraph, except that these defendants admit that during the existence of the State of war between the United States and the Imperial German Government the cost of the manufacture and distribution of gas increased owing to abnormal and temporary conditions existing during said period.

VII.

Answering the allegations of Paragraph XV of said bill of complaint these defendants deny the allegations thereof.

VIII.

Answering the allegations of Paragraph XVI of said bill of complaint these defendants deny that the rate of eighty cents per thousand cubic feet of gas has during the past year, that is to say, the year 1918, either practically or otherwise deprived the complainant of any return upon the reasonable value of its property devoted to the manufacture and distribution of gas. They deny that at any time since the rate went into effect has the complainant failed to have any fair return upon said property; they deny that said act is or at any time was in violation of Section 10 of Article I of the Constitution of the United States or in violation of the Fourteenth Amendment of the said Constitution for the reasons stated in said bill of complaint or for any other reason. These defendants allege that said Chapter 125 of the Laws of 1906 is in all respects a valid and subsisting statute and governs and fixes the maximum rates and charges which complainant is entitled to demand and receive for the service therein provided for.

40 These defendants further allege that the gross operating revenues received by complainant in the year 1918 and its net income for said year are not fair or lawful criteria of the return heretofore earned and hereafter to be earned by complainant under Chapter 125 of the Laws of 1906 of the State of New York. These defendants further allege that the costs entering into the manufacture and distribution of gas in the year 1918 were abnormally and temporarily high owing to the existence of a state of war between the United States and the Imperial German Government. Upon information and belief these defendants further allege that heretofore and before the commencement of this suit complainant earned a reasonable and fair average return upon the fair value of its property employed in the public service, and will hereafter earn such fair return on said value under the said act of 1906. These defendants further allege that the hypothetical cost of reproducing complainant's property in the year 1918 during the existence of said state of war is not the fair value of the complainant's property and that to base rates for gas upon a valuation representing a hypothetical cost of reproduction in the year 1918 or during the said war period would be unlawful and manifestly unfair and unreasonable to the public and would result in allowing complainant to take advantage of a public calamity as a means of increasing its rates above what would be a fair return upon the fair value of its property employed in the public service.

These defendants further allege that said Chapter 125 of the Laws of 1906 provides that the illuminating gas to be furnished by
41 complainant thereunder shall have an illuminating po-er of not less than twenty-two sperm candles of six to a pound burning at the rate of one hundred and twenty grains of spermaceti per hour tested at a distance of not less than one mile from the distributing holder by a burner consuming five cubic feet of gas per hour and these defendants allege that the complainant has persistently, continuously, knowingly and wilfully failed to abide by and comply

with the foregoing provision of said Chapter 125 of the Laws of 1906 in that it has persistently, continuously, knowingly and wilfully failed during the year 1918 to furnish gas having illuminating power of not less than twenty-two sperm candles of six to a pound burning at the rate of one hundred and twenty grains of spermaceti per hour tested as provided in the said act and has furnished gas throughout the year 1918 which when tested as provided by the said act had on the average an illuminating power much less than twenty-two sperm candles to a pound burning at the rate of one hundred and twenty-two grains of spermaceti. As a result of said failure of complainant to comply with the statute consumers received gas of a lesser heating and lighting value than they were entitled to under said act and were obliged to and did pay more for gas necessarily consumed by them than they would have paid had complainant complied with said act of 1906 and the gas actually consumed was inferior to twenty-two candle power gas. These defendants allege that the failure of the complainant herein to furnish gas of a candle power provided for by the said act of 1906 was occasioned by the fact that the complainant voluntarily and without compulsion of law, pursuant to contracts made by it, extracted from the gas after its manu-
42 facture and before its distribution to consumers much of the enriching oil contained therein for the purpose of manufacturing a product known as toluol with the result that the gas when tested as provided by said statute had a candle power much less than twenty-two candle power. These defendants allege that despite this fact complainant during said year 1918 continued to exact and collect from consumers the rate of eighty cents per thousand cubic feet without giving to said consumers any credit or allowance whatever for the loss in candle power occasioned by complainant's voluntary act and that complainant has included in its operating expenses of 1918 the cost of manufacturing twenty-two candle power gas. These defendants allege that said acts of complainant were illegal and in fraud of the rights of consumers under said statute of 1906 and that because of said acts of complainant under said statute complainant does not come into this Court of equity with clean hands and in no event is entitled to charge to operating expenses of 1918 the cost of manufacturing twenty-two candle power gas or to any assistance or relief from this Court against the provisions of the act of 1906 (which complainant has violated as aforesaid in 1918) because of conditions, costs or return resulting from its operations during the said year 1918.

IX.

Answering the allegations of Paragraph XVIII of said bill of complaint these defendants are without knowledge of the allegations of fact in said paragraph, therefore these defendants deny the same.

43 X.

Answering the allegation of Paragraph XX of said bill of complaint that the complainant can only obtain relief in the Court of

equity these defendants deny the said allegation and deny that the inte-position of the power of the Court of equity is necessary in any manner or at all to protect the alleged rights of the complainant or complainant's property herein against any action which can be taken by these defendants under and pursuant to the statutes of the State of New York.

Wherefore these defendants pray that the bill of complaint herein be dismissed with costs.

GODFREY GOLDMARK,
Solicitor for Defendants, Travis H. Whitney, Charles S. Hervey, and Frederick J. H. Kracke, Constituting the Public Service Commission of the State of New York, First District.

No. 49 Lafayette Street, Borough of Manhattan, New York City.

GODFREY GOLDMARK,
Counsel.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed Feb. 17, 1919.

44 At a Stated Term of the District Court of the United States for the Southern District of New York, in the Second Circuit, Held in the Post Office Building, in the Borough of Manhattan, in the City, County, and State of New York, on the 16th Day of May, 1919.

Present: Hon. Julius M. Mayer, United States District Judge.

In Equity.

15—358

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, as Public Service Commissioner of the State of New York, First District, Defendants.

Order Appointing Special Master.

Issue having been joined in this case upon the filing of the answers of the above named defendants to the bill of complaint herein, and the complainant having moved, upon the affidavit of John A. Carver, Esq., verified the 30th day of April, 1919, for the appointment of a Special Master herein, and it appearing that there is no objection thereto on the part of the defendants:

Now, on motion of Messrs. Shearman & Starling, solicitors for the complainant, it is ordered:

1. That Abraham S. Gilbert, Esq., be, and he hereby is, appointed Special Master, to take all of the testimony and evidence respecting the issues herein, make all needed computations and fully find the facts; but nothing herein contained shall be construed as meaning that the Special Master's findings of fact shall be final, but only that he shall find the facts for the purpose of aiding the Court and making his recommendations. The said Master shall, before submitting to this Court his final report, prepare and serve on the solicitors for the respective parties hereto a draft of such report.

45 2. The said Master shall give due notice to all parties hereto and shall proceed promptly to the hearing of the testimony and evidence in this cause, and shall, so far as practicable, continue the hearing of the said cause from day to day; and, whenever deemed by him to be necessary for the prompt completion of such hearings, he shall hold two sessions in each day, until the completion of the taking of testimony and evidence.

3. The said Master shall report to this Court all the testimony and evidence received by him, together with his findings of fact and his recommendations as to the facts and the law, with diligence, it being the intent of this order that the report of the Master and exceptions thereto shall come on for hearing no later than the second Monday of October, 1919.

JULIUS M. MAYER,
United States District Judge.

(Endorsed:) U. S. District Court, S. D. of N. Y. Filed May 16, 1919.

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50 United States District Court, Southern District of New York.

In Equity.

No. 15-358.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District, Defendants.

Report of the Special Master.

To the Honorable Judges of the said Court:

I, the under-signed, Special Master appointed by Honorable Julius M. Mayer, District Judge, by order dated the 16th day of May, 1919, "to take all of the testimony and evidence with respect to the issues herein, make all needed computations and fully find the facts, and * * * report to this Court all the testimony and evidence received by him, together with his findings of fact and his
51 recommendations as to the facts and the law," do hereby respectfully report: that having been attended by counsel as below stated, I proceeded to take the proofs submitted by the several parties and to hear arguments thereon, the proofs so taken consisting of nineteen volumes of printed testimony, pages 1 to 15,919, which are herewith submitted and filed, together with a stipulation signed by the various solicitors of record waiving the signatures of the various witnesses to their several depositions and further waiving the filing of the original exhibits marked in evidence. As many of the exhibits consist of very large volumes of account books of the complainant and other companies, the question of filing copies of all of the original exhibits with the Court will require a further order.

There appeared before me as counsel the following:

For complainant:

Messrs. William L. Ransom, Charles A. Vilas and Jacob H. Goetz;

For the defendant Newton:

Hon. Wilbur W. Chambers, Deputy Attorney General of the State of New York;

For the defendant Swann:

Hon. John P. O'Brien, Assistant Corporation Counsel (now Corporation Counsel) of the City of New York;

For the defendant Public Service Commission:

Hon. William Hayward, Mr. John Holley Clark, Jr., and Mr. Eli Neumann.

Upon the proofs so taken, I find and report as follows:

1. The complainant Consolidated Gas Company of New York was organized in the year 1884, under and in pursuance of the
52 provisions of Chapter 367 of the Laws of 1884, entitled "An act to authorize the consolidation of manufacturing corporations."

2. The organization took place by the consolidation of six then existing gas companies, as follows:

New York Gas Light Co.,	incorporated	in 1823.
Manhattan Gas Light Co.	"	" 1830.
Metropolitan Gas Light Co.	"	" 1855.
Harlem Gas Light Co.	"	" 1855.
Municipal Gas Light Co.	"	" 1871.
Knickerbocker Gas Light Co.	"	" 1876.

3. At the time of consolidation, the six companies above described owned and used certain lands, buildings and other property, real and personal, for, and were actually engaged in, the manufacture, sale and distribution of gas in what was then the City of New York, now the Borough of Manhattan, City of New York. In addition to the property above described, the six constituent companies were possessed of, owned and were in the actual enjoyment of perpetual franchises and rights:

(1) To be corporations and to exercise the privileges and rights of corporate action;
(2) To use the streets, alleys and public places of the City of New York, for the purpose of laying street mains therein and supplying gas through said mains to the inhabitants of the city;
(3) Sundry other intangible rights.

4. By virtue of the consolidation and of the law authorizing it, the complainant company became possessed of and became the owner in fee simple of all of the real property owned by the six constituent companies and the owner of the franchises and rights then owned, possessed or enjoyed by the constituent companies and of the personal property owned by said companies.

53 5. The complainant company has ever since the date of consolidation (November 10, 1884) owned, possessed, used and enjoyed all of the said franchises and rights of the said constituent companies, and still does own, possess, use and enjoy the said franchises and each of them, together with additional rights and franchises from time to time acquired by it, and the said complainant company, by virtue of the said franchises and rights, has ever since said date maintained and still does maintain its mains and services in the streets, alleys and public places of the City of New York, and has supplied and still does supply gas through said mains and services to the inhabitants of the City of New York.

6. An appraisal was made during the summer of 1884 by the interested parties of the tangible property of the six constituent companies, amounting in the aggregate to $30,052,453.96. Upon revision the final total was reduced to $29,994,000.00. The value of the franchises and rights of the constituent companies was then estimated at $7,781,000.00, said sum being by agreement between the companies apportioned among them in proportion to their respective sales of gas.

7. The amount of the capital and assets of the complainant on organization, excluding working capital, was made up as follows:

Real Estate	$10,332,000.00
Plant	12,175,000.00
Mains	5,217,000.00
Services	1,005,000.00
Meters	1,195,000.00
Office furniture and fixtures	70,000.00
Total	$29,994,000.00
Franchises and rights	7,781,000.00
Total	$37,775,000.00

54 8. The figures at which these assets were acquired by the complainant company, and upon which its books were opened, was accordingly $37,775,000.00, although the authorized capital of the company under the consolidation agreement for the purpose of taking over these constituent companies was fixed at $39,078,000.00, leaving a balance of $1,303,000.00 to provide working capital.

9. The figure of $39,078,000.00, the amount of capital authorized for the purpose of taking over the properties of these constituent companies, was upon the basis of the actual market value of the shares of the constituent companies at that time.

10. Stock of the complainant company to the aggregate of $37,775,000.00 was thereupon issued in purchase of the assets of the six constituent companies appraised as above stated, except that $2,239,000.00 was retained in the treasury of the complainant company to retire obligations of a like amount of said constituent companies

which might be a lien on the property, and $15,940.00 was retained for the purpose of making sundry adjustments pursuant to agreement, the balance $35,430,060.00 being issued directly to the stockholders of the constituent companies.

11. On or about November 11, 1884, the first appraisal of the values of the properties of the several constituent companies as aforesaid made, was adjusted to cover additions to that date, and the said adjusted appraisal as then made was as follows:

Real Estate	$10,332,000.00
Plant	12,182,491.41
Mains	5,233,962.10
Services	1,034,241.41
Meters	1,231,753.98
55 Meter cocks and connections	11,926.53
Pipes and specials	88,398.43
Office furniture and fixtures	70,000.00
Horses, wagons and harness	1,115.00
Tools and implements	3,273.70
Gas Stoves	1,256.45
Scows	.....
Franchises and rights	7,781,000.00
Total	$37,971,419.01

12. Since the organization of the complainant company, its capital stock has been increased from time to time, much of the proceeds of this additional capital stock having been used for the purchase of stock and securities of other gas and electric companies in and about the City of New York, so that at the time of the commencement of this action the complainant company owned all of the stock of the Astoria Light, Heat and Power Company, and practically all of the stock of the New Amsterdam Gas Company, the Standard Gas Light Company, New York Edison Company, United Electric Light & Power Company, and various other gas and electric companies, and also owned a majority of the stock of the New York Mutual Gas Light Company. The New Amsterdam Gas Company owns all of the stock of the East River Gas Company and of the Central Union Gas Company, and, either directly or through its ownership of the stock of the Central Union Gas Company, all of the capital stock of the Northern Union Gas Company, substantially one-half of which is owned by the Central Union Gas Company.

13. By Chapter 125 of the Laws of 1906 it was provided, among other things, that "a corporation, association copartnership or person engaged in the business of manufacturing, furnishing or selling illuminating gas in the City of New York * * * shall
56 not charge or receive for gas manufactured, furnished or sold in said City a sum per thousand cubic feet in excess of the following rates: (1) In the Borough of Manhattan * * * eighty cents." It was further provided in and by said statute that

"the illuminating gas furnished by any such corporation, association, copartnership or person shall have an illuminating power of not less than twenty-two sperm candles of six to a pound, burning at the rate of 120 grains of spermaceti per hour, tested at a distance of not less than one mile from the distributing holder by a burner consuming five cubic feet of gas per hour, and each one hundred cubic feet of gas shall not contain more than five grains of ammonia, nor more than twenty grains of sulphur, nor more than a trace of sulphurated hydrogen. The pressure of illuminating gas in any service mains in said city at any distance from the place of manufacture shall not be less than one inch nor more than two and one-half inches."

14. Shortly after the enactment of this statute, the complainant company instituted an action in the Circuit Court of the United Sates, Southern District of New York, for a decree declaring the said statute unconstitutional because confiscatory of the complainant's property. That action having resulted in a decree in favor of the complainant, was presented on appeal to the Supreme Court of the United States, which court by decision rendered January 4th, 1909, opinion filed January 12th, 1909 (212 U. S. 19), dismissed the bill in the following language:

"It may possibly be, however, that a practical experience of the effect of the acts by actual operation under them might prevent the complainant from obtaining a fair return, as already described, and in that event complainant ought to have the opportunity of
57 again presenting its case to the court. To that end we reverse the decree, with directions to dismiss the bill without prejudice."

15. Since the decision by the United States Supreme Court (212 U. S. 19) the complainant company has continued the manufacture and sale of gas in its own plants and has purchased and received gas manufactured in the plant of the Astoria Light, Heat and Power Company, all of the stock of which company, as above stated, is owned by the complainant company, and also in the plants of the New Amsterdam, Standard and Mutual Gas Light Companies.

16. In the manufacture and distribution of gas, the complainant company established a system of exchanging gas with the other companies above described and entered into so-called agency agreements with the New Amsterdam, Standard and New York Mutual Companies and into a purchase agreement with the Astoria Light, Heat and Power Company.

17. During the year 1918, and for the first eight months of 1919, and for the twelve months ended October 31, 1919, those periods being the ones to which proof was particularly directed, two kinds of gas were manufactured in these various plants: (*a*) coal-gas, and (*b*) water-gas. The complainant company in its own plants in the Borough of Manhattan manufactured water-gas at the two stations

known as Twenty-first Street and Ninety-ninth Street, and made more or less coal-gas at the two stations known as the Fourteenth and Forty-second Street stations. The Astoria Light, Heat and Power Company made coal-gas as well as water-gas. Coal-gas was made by the Astoria Company in two units which may be described as
58 "A" and "B," each with a rated capacity of 10,000,000 cubic feet per day, and water-gas in one unit, to be designated as "C," with a rated capacity of 30,000,000 cubic feet per day. The New Amsterdam Company, The Standard Gas Light Company and the New York Mutual Gas Light Company made and make water-gas.

18. Since January 1st, 1908, the books of account of the complainant company and of all other gas companies in the City of New York have been required to be kept in accordance with the rules and regulations of the Public Service Commission of the State of New York for the First District, which commission has had jurisdiction over said companies pursuant to the provisions of the Public Service Commission Law of the State of New York (so-called), and I find that the books of the complainant company, as well as those of the Astoria Light, Heat and Power Company, have been kept in conformity with said rules and regulations and accurately set forth the facts therein contained.

19. In the manufacture of water-gas of the statutory standard of 22 candle power, there is required the use, per thousand cubic feet of gas made, of approximately 4.1 gallons of gas oil of the gravity and quality now being supplied to the gas company and in the manufacture of coal-gas approximately 1.6 gallons of such gas oil are required to raise such coal-gas to the required candle-power.

20. The average price reasonably and necessarily paid by the Consolidated Gas Company for gas oil during 1918 was 6.5 cents per gallon, and during the first eight months of 1919 was 6.9 cents per gallon. The records of the Astoria Light, Heat and Power Company would indicate that the average cost of gas oil to that company
59 in 1918 was 6.5 cents per gallon and during the first eight months of 1919 was 6.8 cents per gallon.

21. The present price at which contracts may be made for the delivery of gas oil alongside gas manufacturing plants in the Borough of Manhattan or in Long Island City is in excess of 6.9 cents per gallon plus lighterage cost. The trend of oil prices is sharply upward.

22. In the manufacture of water-gas, there is required per thousand cubic feet of gas made approximately 35 pounds of anthracite coal of the grade of coal being supplied in recent years or its fuel equivalent, of which 35 pounds of coal, about 32.5 pounds goes into the generators, and of which about 2.5 pounds are unsuitable for use in the generators and are used under the boilers along with approximately 11.5 pounds of anthracite boiler fuel or its equivalent in water-gas tar (one gallon of such tar weighing 9 pounds and 1

pound of tar being a fuel value of about 1.7 pounds of the grade of boiler fuel now and recently supplied).

23. The price of anthracite generator fuel was $8.26 per gross ton as of October, 1919, and now is more than that sum, the exact extent of such further increase not appearing in the record.

24. The price of anthracite boiler fuel was $5.12 per gross ton as of October, 1919, and now is more than that sum, the exact extent of such further increase not appearing in the record.

25. In addition to the cost of fuel, there is involved in water-gas manufacture the expense of labor handling of fuel used in the generators and under the boilers.

60 26. In the manufacture of water-gas there is also required the use of iron mass, city water and incidental minor materials and supplies.

27. In the manufacture of water-gas there is realized as a residual credit about .656 gallons of water-gas tar per thousand cubic feet of gas made, which, as of October, 1919, had a market or sale value of 4 cents per gallon. There is also realized as a residual credit in water-gas manufacture about .0615 gallons of drip oil per thousand cubic feet of gas made, which, in October, 1919, had a market or sale value of 5.7 cents per gallon.

28. The evidence adduced in this record affords no grounds for expecting that the prices of materials or the wages paid to labor will be reduced during 1920 or 1921 or at any time which can now be forecast.

29. There is necessary in the manufacture of water-gas the employment of gas-making labor, the employment of repair labor, the use of repair material, the incurring of miscellaneous works expense and the incurring of gas storage expenses at the works and distributing holders.

30. During the year 1918, under the prices of materials and labor at that time in force, the cost of water-gas manufacture (exclusive of gas storage expense) was 42.66 cents per thousand cubic feet of gas made in the plants of the Consolidated Gas Company, and during the eight months ending August 31, 1919, the cost of water-gas manufacture (exclusive of gas storage expense) under the prices of materials and labor at that time in force, was 48.43 cents per thousand cubic feet of gas made in the plants of the Consolidated Gas Company.

61 31. During the year 1918 under the prices of materials and labor at that time in force, the cost of water-gas manufacture (exclusive of gas storage expense) was 40.54 cents per thousand cubic feet of gas made in the plants of the Astoria Light, Heat and Power Company, and during the eight months ending August 31, 1919, the cost of water-gas manufacture (exclusive of gas stor-

age expense) under the prices of materials and labor at that time in force was 45.75 cents per thousand cubic feet of gas made in the plants of the Astoria Light, Heat and Power Company.

32. The average and reasonable cost of gas storage is one cent (1¢) per thousand cubic feet.

33. In the manufacture of coal gas there is required the use of approximately 200 pounds of bituminous gas coal per thousand cubic feet of gas made. There is also required per thousand cubic feet of gas made approximately 10 pounds of anthracite boiler coal or its fuel equivalent, and there is also required the expense of labor handling such gas coal and boiler coal.

34. The present cost to the Consolidated Gas Company and the Astoria Light, Heat and Power Company of such bituminous coal is at least $6 per gross ton, and the cost of such bituminous gas coal to the Consolidated Gas Company and the Astoria Light, Heat and Power Company as of October, 1919, was $5.90 per gross ton.

35. The cost of the bituminous gas coal used in the manufacture of coal gas at the plants of the Astoria Light, Heat and Power Company during the year 1918, including the labor handling thereof, was, under the prices and rates of pay at that time in force, 46.25 cents per thousand cubic feet of gas made, and during the
62 eight months ended August 31, 1919, was 55.86 cents per thousand cubic feet of gas made.

36. In the process of coal-gas manufacture there are derived per thousand cubic feet of gas made certain residuals to be credited to the cost of manufacture in quanties, and the market or sale price thereof, as of October, 1919, is as follows:

Coke and breeze for sale or use for other than coal-gas uses 100 pounds at $6.347 per gross ton	$.2833
Coal tar, 1.2 gallons at $.044 per gallon	.0528
Ammoniacal liquor (sulphate), 1.5 pounds at $.0176 per pound	.0264
Ammonia (absolute) .03 pounds at $.12 per pound	.0036
Ammonia sulphate .30 pounds at $.0485 per pound	.0146
Cyanogen .15 pounds at $.29 per pound	.0435
Total	$.4242

37. As a deduction from the foregoing residual credits aggregating 42.42 cents per thousand cubic feet of gas made, however, there is an expense of handling residuals including the cyanogen extraction, amounting to approximately 5 cents per thousand cubic feet of gas made, making the net proceeds from residuals, 37.42 cents per thousand cubic feet of gas made.

38. In order to enrich coal-gas so that the same shall fulfill the statutory standard of 22 candle power there is required the use of approximately 1.6 gallons of additional gas oil in the manufacture

of water-gas of a higher candle-power to be mixed with such coal-gas.

39. In the course of the process of this enrichment there is derived a tar credit amounting to approximately 0.25 gallons of tar
63 per thousand cubic feet of gas made, which had a market or sale price of 4 cents per gallon as of October, 1919.

40. In the manufacture of coal gas there is also required the use of iron oxide, city water and incidental minor materials, and the expenses of the handling of the materials.

41. In the manufacture of coal-gas there is also required the cost and expense of gas-making labor, the cost *of* expense of repair labor, the cost and expense of repair material, the elements of miscellaneous works expense and the item of expenses in connection with gas storage at the works and distributing holders.

42. During the year 1918, under the prices of labor and materials at that time in force the cost of coal-gas manufacture (exclusive of gas storage expense) was 33.95 cents per thousand cubic feet of gas made in the plants of the Astoria Light, Heat & Power Company, and during the eight months ending August 31, 1919, the cost of coal-gas manufacture (exclusive of gas storage expense) under the prices of materials and labor at that time in force, was 47.31 cents per thousand cubic feet of gas made in the plants of the Astoria Light, Heat & Power Company.

43. It is impossible on the record in this case to make any finding as to the cost of making coal-gas in the plants of the complainant company at the 14th and 42nd Street plants during the year 1918 or during the first eight months of the year 1919.

44. On the basis of the ratio of 22 per cent. coal-gas and 78 per cent. water-gas obtaining in the manufacture of gas supplied to the consumers of the complainant company, the average station
64 cost of such gas, as of September 1, 1919, including the cost of gas storage, was not less than 47.09 cents per thousand cubic feet of gas made and not less than 50.63 cents per thousand cubic feet of gas sold. The average station cost of such gas at this time is not less than 50.63 cents per thousand cubic feet sold.

45. Prior to the year 1906 the officers of the complainant company concluded in good faith that the time had arrived when further extensions of gas manufacturing plants on Manhattan Island would not be permitted and it was absolutely essential that manufacturing facilities be established elsewhere. In accordance with this conclusion the complainant company caused to be organized the Astoria Light, Heat & Power Company and caused to be erected at Astoria, Long Island City, two coal-gas units and the one water-gas unit above described, and the complainant company also caused a tunnel to be built from the works at Astoria to the Borough of The Bronx to convey gas to the Borough of Manhattan, which tunnel was constructed by the East River Gas Company, which had built the so-

called Ravenswood tunnel prior to the acquisition of any stock interest in the East River Gas Company by the New Amsterdam Gas Company, or in the New Amsterdam Gas Company by the Consolidated Gas Company. The franchises of the Consolidated Gas Company did not give it any right to construct a tunnel under the East River.

46. During the year 1918, the complainant company sold to its consumers 18,029,245,000 cubic feet of gas, and during the first eight months of 1919 sold to its consumers 12,253,567,100 cubic feet of gas. The total sales of the complainant company during
65 the year 1919 were at least 18,500,000,000 cubic feet, and during the year 1920 the sales of the complainant company will amount to at least 19,000,000,000 cubic feet.

47. In the manufacture and sale of gas, a percentage of the gas made is lost, due to condensation, differences in temperature at the consumers' meters, slow meters, leaks and the like. I find that unaccounted for gas reasonably represents approximately 7 per cent. of the gas made and that in calculating the requirements of the complainant company, that figure should be used as a basis for computation.

48. The consumption of gas and its sale varies from time to time, depending upon the weather. The low mark of gas sales is found in the warm summer months, and the peak or maximum demand is found in the winter months. The complainant company must therefore be prepared not alone to make sufficient gas to meet a total annual demand but must be prepared to meet a maximum day's demand.

49. Upon the basis of 7 per cent unaccounted for gas, the complainant company should have a rated daily manufacturing capacity of at least 108,500,000 cubic feet, allowing for reasonable reserve capacity.

50. At the present time the complainant company has the following plant capacities per day:

(*a*) Twenty-first Street, 28,500,000 cubic feet;
(*b*) Ninety-ninth Street, 5,500,000 cubic feet;
(*c*) Fourteenth Street, 5,000,000 cubic feet;
(*d*) Forty-second Street, 4,500,000 cubic feet, in addition to which it has available the capacity of the Astoria plant of 50,000,000 cubic feet, making a total of 93,500,000 cubic feet daily capacity.

66 51. If the Fourteenth and Forty-second Street Plants were discarded, it would be absolutely necessary for the complainant company to find equal plant capacity elsewhere at a cost not less than the present book cost and value of those stations.

52. In making up its present deficiency of plant capacity, the complainant company has been using 10,686,000 cubic feet of the manufacturing plant capacity of the water-gas plant of the New York Mutual Gas Light Company. Pursuant to the agency agreements, an interchange of gas takes place between the complainant and the

Standard and New Amsterdam companies, as the result of which the complainant is sometimes a debtor and sometimes a creditor company, on account of the gas so interchanged.

53. An additional 30,000,000 cubic foot water-gas unit is at present being constructed in connection with the plant of the Astoria Light, Heat and Power Company, under a contract calling for its completion on or before December 1, 1920, at an approximate expense of $1,500,00- for the additional structures, apparatus, equipment, connections and the like required for the installation and operation of such 30,000,000 cubic foot water-gas unit. The use of the 10,686,000 cubic feet of manufacturing plant capacity of the New York Mutual Company, hitherto used by the complainant company, will be discontinued upon the completion and operation of the new water-gas unit of Astoria. I have, therefore, excluded from consideration, in determining the investment in manufacturing plant, used in the manufacture of gas sold by the complinant company, the $2,198,377.35 representing the investment in the portion of the plant of the New York Mutual Company hitherto used in manufacturing gas sold by the Consolidated Company, and
67 have included, in lieu thereof, one-half of the additional investment required for the new water-gas unit in course of construction at the Astoria plant.

54. I find that it is absolutely essential, for the purpose of meeting the demands of its consumers, that the complainant company use all of the four plants on Manhattan Island above described as well as all of the plant facility now at Astoria and at least half of the additional facility now under construction, or in place thereof other plant capacity, and I also find that in connection with the use of the Astoria plant, the complainant company must use the so-called Astoria tunnel for the purpose of conveying gas from Astoria to Manhattan.

55. In arriving at the cost of taxes, there must be included not alone the manufacturing plants on Manhattan Island, but also the present manufacturing plant at Astoria and the tunnel conveying gas from Astoria to Manhattan, and in addition thereto, taxes on one-half of the additional plant facilities now under construction at Astoria or other plant facility to that same extent.

56. I find that the average cost of taxes applicable to the manufacture and distribution of one thousand cubic feet of gas, whether that figure be arrived at by excluding the Fourteenth and Forty-second Street plants but including other plant capacity in place thereof to an equal amount and including all of the present Astoria plant, and the Astoria tunnel and one-half of the additional unit now under construction at Astoria, or by including the Fourteenth and Forty-second Street plants and all of the existing Astoria plant, together with the tunnel and one-half of the additional facilities, or by excluding the Fourteenth and Forty-second Street plants,
68 but including the present Astoria plant and all the additional 30,000,000 cubic foot plant, to be not less than seven and one-half cents ($7\frac{1}{2}¢$) per thousand cubic feet of gas sold.

57. There must also be added to the cost of making and distributing gas the cost of maintaining the Astoria Tunnel. I fix this cost at not less than one cent (1¢) per 1,000 cubic feet of gas sold.

58. I find the average cost of renewals and replacements which must be added to the cost of gas to be three cents (3¢) per thousand cubic feet of gas sold.

59. In addition to the items heretofore referred to, there must be added to the cost of gas to the consumer various items entering into the cost of distribution, including distribution superintendence, supplies and expenses, meter and installation work, work on consumers' premises, repairs on street mains, repairs on services, repairs on meters, repairs on buildings (branches, street departments, shops, etc.) repairs on tools (street departments, shops, etc.), repairs on gas appliances, public street lighting, commercial expenses, salaries, general office, supplies and expenses general office, legal expense, claims and arrears, insurance, vacation and sickness, contribution to employees' mutual aid society, superannuation, stable expense, automobile expense, claims for damages, uncollectible bills, interest on consumers' deposits, use of distributing system and miscellaneous general expenses, and I find that if the operation of the Astoria plant be combined with the general operations of the plaintiff company that the cost of all of these items will not be less than twenty cents (20¢) per thousand cubic feet of gas sold.

60. Included in the cost of distribution are various items, such as commercial expenses, having to do with the sale and rental
69 of appliances and the like, resulting in miscellaneous operating revenue to the complainant company. In 1918 the miscellaneous operating revenue represented 7.28 cents per thousand cubic feet; for the first eight months of 1919 this same revenue showed 6.62 cents per thousand cubic feet. The reasonable average would appear to be 6.95 cents. I, therefore, find that 6.95 cents per thousand cubic feet should be credited against the cost of making and distributing gas on account of miscellaneous revenue.

61. I find the total cost of the gas delivered to consumers by the Consolidated Gas Company to be at least 82.13 cents per thousand cubic feet, from which should be deducted 6.95 cents for miscellaneous revenue, making the net cost of gas delivered to the consumer 75.18 cents per thousand cubic feet.

62. I find the average selling price of gas, including that sold to the City of New York at 75 cents per thousand cubic feet, to be 79.91 cents per thousand cubic feet, showing a net profit to the complainant company, as of September, 1919, of not more than 4.73 cents per thousand cubic feet of gas sold.

63. Exclusive of working capital, I find the fair value of the property used and needed in the manufacture, transmission and distribution of the quantity of gas required by the consumers of the complainant company, as of January 1, 1919, and since that date, and on which it is entitled to have a fair return computed, to be at least the sum of $71,054,351.14, arrived at as follows:

Property other than particularly specified	$38,675,393.99
Franchises	7,781,000.00
Astoria property	17,169,342.57
Astoria tunnel	5,178,614.58
One-half the cost of the new 30,000,000 unit	2,250,000.00
Total	$71,054,351.14

70 64. That the complainant Consolidated Gas Company owns and uses in its gas business, and did so own and use on December 31, 1918, and ever since, the following parcels of real property within the Borough of Manhattan and The Bronx, in the City of New York, used and useful in its gas business, and included in the first item of the property referred to in finding No. 63 above:

Stations.	Block No.	Lot No.
Hester St. Office	239	1 and 5
General Office Bldg.	870	47 and 60
14th St. Holder Station	989	1
14th St. Station	982	13
" "	988	1
" "	991	1 and 47
E. 17th St. Yard	985	7, 19, 20
21st St. Station	951	35
" "	952	7, 29, 30 and 35
" "	953	1
" "	978	5 and 6
" "	979	1 and 27
" "	987	37
42nd St. Station	1089	1
" "	1090	23
" "	1107	7
44th St. Holder Station	1092	7 in part
" " "	1093	9 " "
57th St. Office Bldg.	1028	38
E. 63rd St. Holder Station	1457	6
W. 65th St. Yard	1177	21
W. 65th St. Holder Station	1157	1
99th St. Works	1670	1
" "	1692	1
E. 111th St. Yard	1683	18
E. 111th St. Holder Station	1682	8 and 11
E. 111th St. Garage and Storage Yard	1704	5
E. 111th St. Dock Property	1712	2
3rd Ave. Commercial Office	1642	32 and 33
W. 132nd St. Holder Station	1998	50-3-4-5-6
" " "	1999	1
E. 132nd St. Tunnel Head and Storage Property	2583	360
W. 159th St. Meter Shop	2108	23
Kingsbridge Holder Station	3236	1

65. That the values upon the above-stated parcels of land (unimproved) owned by the complainant company, by the taxing authorities of the City and State of New York, as of October 1, 1918,
71 for the levying of taxes for the year 1919, were respectively as follows:

Block No.	Lot No.	Value.
239	1	$90,000
239	5	37,000
870	47	21,000
870	60	410,000
989	1	155,000
982	13	326,000
988	1	390,000
991	1	180,000
991	47	56,000
985	7	178,000
985	19	6,500
985	20	6,500
951	35	53,000
952	7	292,000
952	29	11,000
952	30	24,000
952	35	35,500
953	1	526,000
978	5	17,000
978	6	365,000
979	1	430,000
979	27	6,000
987	37	105,000
1089	1	900,000
1090	23	82,500
1107	7	375,000
1092	7	231,000
1093	9	228,775
1028	38	400,000
1457	6	145,000
1177	21	265,000
1157	1	815,000
1670	1	630,000
1692	1	245,000
1683	18	80,000
1682	8	10,000
1682	11	445,000
1704	5	355,000
1712	2	52,500
1642	32/33	48,000
1998	50	22,000
1998	53	7,000
1998	54	7,000
1998	55	7,000

Block No.	Lot No.	Value.
1998	56	7,000
1999	1	165,000
2583	360	67,000
2108	23	21,000
3236	1	200,000
		$9,531,275

72 In addition to the foregoing, the Astoria Light, Heat and Power Company owns and uses, and did own and use on December 31, 1918, and ever since, land in the Borough of Queens, of which the value (unimproved) determined and assessed by the tax authorities of the City and State of New York, as of October 1, 1918, for the levying of taxes for the year 1919, was $2,438,910, making a total of $11,970,185 of assessed value of land (unimproved).

66. That the values stated in finding No. 65 represented the opinion of the respective Deputy Tax Commissioners as to the amounts of money for which such parcels would sell under ordinary circumstances if wholly unimproved; that such values were assessed and determined on that basis and do in my judgment represent at least the sums for which such parcels would so sell under such circumstances.

67. The plant machinery and equipment used in the gas business of the complainant company have been and are maintained in excellent operating condition; proper repairs renewals and replacements have been made; and the same are now in as high a state of efficiency as if new.

68. I find that the present cost of reproducing the property described in finding No. 63 above is largely in excess of the sum found by me; and I further find that the present value of the property described in finding No. 63, if based upon the reproduction cost less depreciation, would be in excess of the said sum of $71,054,351.14.

69. I find that the complainant company is entitled to include, in the amount upon which it is entitled to a fair return, the sum of $3,800,000 for working capital.

73 70. I find the total amount on which the complainant company is entitled to have a fair return computed, including working capital, to be $74,854,351.14. On the basis of a daily plant capacity of 108,500,000 cubic feet and 18,500,000,000 cubic feet of sales, the sum of $74,854,351.14 is slightly in excess of $4.00 per thousand cubic feet, and on the basis of 19,000,000,000 cubic feet, a few cents less than $4.00 per thousand cubic feet. I find that $4.00 per thousand cubic feet of gas sold fairly represents the actual investment in property used in the manufacture, transmission and distribution of the gas sold by the complainant company, and such

investment may, for the purposes of this case, be taken to be at least that sum.

71. During the twelve months ended December 31, 1918, the eight months ended August 31, 1919, and the twelve months ended October 31, 1919, the operating revenues of the gas business of the complainant company were not sufficient to pay the reasonable and necessary costs of the manufacture, transmission and distribution of gas and provide a reasonable return upon the value of the property owned and used by the complainant in the manufacture, transmission and distribution of the gas sold by it to its consumers.

72. On the basis of my finding of a net profit of not more than 4.73 cents per thousand cubic feet of gas sold and approximately 19,000,000,000 cubic feet of sales for the year 1920, the complainant company's return, if any, will be not more than $898,700, representing no more than 1.2 per cent upon the fair value of the property used and needed as hereinbefore found, or amounting to a fair and reasonable return upon no more than $11,233,750 of the fair value of the property used and needed as hereinbefore found.

74 73. The reasonable and proper rate of return upon the capital invested in the plants, distributing system, properties and business of the complainant company I find to be not less than eight (8) per cent. per annum, amounting to $5,988,348.09, calculated upon the fair value of the property used and needed as hereinbefore found.

74. I find that the complainant company has complied with the provisions of Chapter 125 of the Laws of 1906 with reference to candle power and the requirements of law regarding pressure.

75. Under the construction which the courts of the State of New York have placed upon the provisions of Section 72 of the Public Service Commissions Law of the State of New York (People ex rel. Municipal Gas Company v. Public Commission, 224 N. Y. 156), the Public Service Commission of the State of New York for the First District, which otherwise would have plenary power over the rates of the complainant Consolidated Gas Company, has been given no power of jurisdiction to fix, or to authorize the complainant to charge, a rate in excess of the 80-cent rate fixed by Chapter 125 of the Laws of 1906, the said Section 72 of the Public Service Commissions Law providing that the Commission may not fix or authorize a rate for gas in excess of such rate as may have been fixed by statute.

76. Various matters comprised within the issues referred to me by the order of May 16, 1919, I have discussed in greater detail in a separate opinion which is herewith submitted and made a part of this report. It is my intention that the facts, and the conclusions regarding the law, set forth for reasons of convenience in that separate document, shall be deemed a part hereof, with the same

75 force and effect as though they had been physically incorporated in this report.

77. I recommend that it be adjudged and decreed that Chapter 125 of the Laws of 1906, in so far as it provides that the complainant Consolidated Gas Company of New York shall not charge or receive for gas manufactured, furnished or sold by it, a sum per thousand cubic feet, in excess of a rate of eight cents per thousand cubic feet, is illegal and void, because in contravention of Section 10 of Article 1 of the Constitution of the United States and of the Fourteenth Amendment to the said Constitution, and that the complainant Consolidated Gas Company of New York have the other and further relief against the defendants in this suit which is asked for in the complaint herein.

All of which is respectfully submitted.

A. S. GILBERT,
Special Master.

Dated New York, May 5, 1920.

76 United States District Court, Southern District of New York.

In Equity.

15–358.

CONSOLIDATED GAS COMPANY OF NEW YORK, Plaintiff,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, constituting the Public Service Commission of the State of New York for the First District, Defendants.

Opinion of the Special Master.

This action was instituted by the complainant against the defendants the Attorney-General of the State of New York, the District Attorney of New York County, and the Public Service Commission for the First District, for a decree declaring Chapter 125 of the Laws of 1906 unconstitutional because confiscatory of the complainant's property; the basis of this claim being that the maximum selling price of eighty cents per thousand cubic feet allowed by statute does not net the complainant a fair return upon the value of the property necessarily used in the manufacture and distribution of gas to consumers in the Borough of Manhattan, City of New York.

77 The action was referred to me as Special Master by order of Honorable Julius M. Mayer, dated the 16th day of May, 1919. The order appointing me provided that I should proceed promptly to the hearing of the testimony and continue the hearing of the cause from day to day, and if necessary for the prompt completion of such hearings, that I hold two sessions each day until the

completion of the taking of testimony and evidence. I was orally directed, however, by the District Judge to allow the defendants until the 15th day of July, 1919, to prepare for trial. Since that date, I have sat almost continuously with the exception of such occasions as I have deemed it proper to grant short adjournments to counsel and on two occasions when I found it necessary to be away from the city. A great mass of testimony has been taken. The record consists of approximately 16,000 printed pages, excluding exhibits which have not yet been printed. It is important, therefore, that I give the Court reviewing my report a statement of the basis upon which my report has been made, and the manner in which I reached the conclusions set forth.

In accordance with the requirements of the order of May 16, 1919, and the accustomed practice in the trial of rate suits in equity in this district, I submitted to counsel for all of the parties, on April 19, 1920, a preliminary draft of my report and of this opinion as well. On April 28, 1920, I received from all counsel informal written statements embodying their suggestions or criticisms regarding the matters covered by this preliminary draft. Thereupon I have proceeded to complete and file my report and opinion in its present and final form, which alone is to be taken as completely embodying my findings and conclusions.

78 *Organization and Capitalization of Complainant.*

The complainant company was organized in 1884 by the consolidation of six gas companies then doing business in the City of New York. These companies had been in business for many years. One of them had been organized as far back as 1823. The property owned and used by these companies in 1884 had been purchased from time to time, covering a period of fifty or sixty years or more prior to the time of consolidation. Some of the property purchased was waterfront property at a time when the highwater mark of the East River was much further west on Manhattan Island than it is today, so that considerable of the land which was in occupation by the gas companies in 1884 was made land, as the result of filling in and reclaiming land under water then part of the East River. These various gas companies had from time to time obtained franchises of various character from the State and from the City for the laying of pipes and mains and for the doing of business; they were unrestricted as to price and conducted their business without regulation by the State. The stock of the various companies therefore became valuable property, and in the summer of 1884 the quoted value of the stock of these six companies in the aggregate was $39,078,000.

Whether Chapter 367 of the Laws of 1884 was the result of a scheme to combine and consolidate the various gas companies of the City of New York, or whether the scheme to consolidate these companies was conceived as a result of the passage of Chapter 367 of the Laws of 1884 I am unable to say. The probability is that

Chapter 367 of the Laws of 1884 came into existence because of the scheme to consolidate the various gas companies.

79 However that may be, Chapter 367 of the Laws of 1884 was passed on May 28, 1884, and quite soon thereafter the plan to consolidate the various gas companies in the City of New York was instituted. Originally, it was planned to combine seven companies, the six referred to by me in my report, and a seventh, the New York Mutual Gas Light Company. The total capitalization originally proposed was $45,000,000. It was found, however, that the New York Mutual Gas Light Company, incorporated in 1866, was prevented from entering into the merger because of a prohibition in its charter. That company therefore was dropped from the plan, the amount which had been figured as applicable to that company deducted, and the balance of the capital, $39,078,000, was figured as the authorized capital of the company upon the basis of the actual market value of the shares of the constituent companies at that time.

The statute (Chapter 367 of the Laws of 1884) provided that:

"the amount of capital, the number of shares of the stock into which the same is to be divided (which capital shall not be larger in amount than the fair aggregate value of the property, franchises and rights of the several companies thus to be consolidated, but which may be increased in accordance with the provisions of the Act entitled * * *) and the manner of distributing such capital among such consolidated corporations or the holders of the stock of the same, with such other particulars as they may deem necessary,"

be stated in the agreement and certificate of incorporation.

The statute further provided that the agreement should not be deemed an agreement of the corporations so proposing to so consolidate until after it had been submitted to the stockholders of each corporation. Thereupon a committee was appointed for the purpose of appraising the various plants and agreeing upon their value. This committee employed Thomas F. Rowland, an engineer experienced in the construction of buildings and apparatus of this character, to appraise the plants. It is quite clear to my mind that Rowland's appraisal did not include the land and did not embrace any examination of meters, services or other property on consumers' premises. However that may be, all of the parties agreed upon certain valuations for real estate, plant, etc., of the various companies aggregating $29,994,000 and they also agreed upon a value for franchises and rights of $7,781,000, making a total of $37,775,000 of stock to be issued, allowing a balance of $1,303,000 for working capital.

Stock to the aggregate of $37,775,000 was thereupon issued in purchase of the assets of the six constituent companies appraised as above stated, except that $2,329,000 was retained in the treasury of the complainant company to retire obligations of a like amount of said constituent companies which might be a lien on the property, and $15,940 was retained for the purpose of making sundry adjustments pursuant to agreement; the balance of $35,430,000 being issued directly to the shareholders of the constituent companies.

Value in 1884 of Property Acquired by Complainant.

It is impossible for anyone to say at this time that the property, assets and franchises transferred by the constituent companies to the complainant company were not of the "fair aggregate value" fixed at that time.

81 Counsel for the defendants, particularly the learned Attorney-General, attempted to show the exact cost of these various properties to the constituent companies. I think they absolutely failed in that attempt. There is no evidence that the constituent companies paid anything for the franchise rights. I am inclined to believe that the actual cost of the various tangible properties to the constituent companies was less than their appraised value in 1884; but as I have already stated, there is no evidence in this case which would justify a finding that the values fixed for the purpose of consolidation in 1884 did not represent the fair value, at that time, of the property acquired by the complainant. However that may be, the complainant company did pay, in the par value of its stock, the price agreed on, and for thirty-six years that agreement fixing that price has remained undisturbed.

In 1885 the Legislature of the State of New York through the Senate appointed a committee to investigate this consolidation. The committee employed counsel and an accountant, received a great mass of testimony and evidence, and made two reports, one being signed by John I. Gilbert, chairman of the Committee, the other being signed by Thomas W. Robinson and Michael C. Murphy—Senator Gilbert evidently believed the complainant company to have been over-capitalized; the majority of the Committee, however, appear to have reached a contrary conclusion. But no action was ever instituted by the State challenging the incorporation of the complainant company; no effort was ever made by the State in any proper proceeding to prove that the property transferred to the complainant company on consolidation was not worth the price agreed on, and the public, through thirty-six years, has been led to believe, by inactivity on the part of the State, that the stock

82 issued by the complainant company on organization was in compliance with Chapter 367 of the Laws of 1884, and was for property "the fair aggregate value" of which was the amount paid in par value stock therefor.

The complainant company began business on the 10th or 11th of November, 1884. In April, 1900, the capital stock was increased to $54,595,200. In July of that year it was further increased to $80,000,000. Today it has an authorized capital stock of $125,000,000, of which there is issued and outstanding $100,000,000. It has also issued and outstanding 7 per cent convertible bonds to the extent of $25,000,000. In the years between 1884 and 1918 the complainant company acquired by purchase practically all of the stock of the New York Edison Company, doing an electric light and power business; the United Electric Light & Power Company, doing a similar business; the Brush Electric Company; the New

Amsterdam Gas Company; the Standard Gas Light Company, and other gas and electric companies. The New Amsterdam Company, practically all of the stock of which is owned by the Consolidated Company, in turn owns all the stock of the East River Gas Company and of the Central Union Gas Company. The Central Union and the New Amsterdam Companies each own about one-half of the stock of the Northern Union Gas Company. The complainant company also owns more than 56 per cent of the stock of the New York Mutual Gas Light Company. It also owns all of the stock of the Astoria Light, Heat and Power Company, to which I shall presently refer. Through its stock control it has a monopoly of the gas and electric business in the Borough of Manhattan, City of New York.

83 Should Earnings of the Electric Lighting Business Offset Losses of the Gas Business?

Counsel for the defendants strenuously insist that in determining whether the complainant company earned or could earn a fair return upon its necessary capital, I should take into consideration the fact that the complainant company monopolizes the gas and electric business in this territory, and the profits earned by the complainant company by reason thereof, offsetting any losses there may be in the gas business by profits from the electric business. Counsel stressed the point that the testimony showed that the electric lighting companies owned by the complainant company were very active in the exploitation of electricity and their efforts to induce consumers to use electricity, rather than gas, and the extension of the use of electricity, the complainant company was put to it to keep up the demand for gas, through the development of new industrial and domestic uses for gas, to take the place of uses for which electricity has proved more popular and suitable. Of course the situation would have been precisely the same in this respect if entirely separate interests controlled the electric business. The two classes of business, however, are closely allied and I appreciate a certain force in the argument presented to me. But the Courts of this state and the defendant Commission alike have declared the law to be that a public utility is not required to sell one of its products at a loss because it sells another product at a reasonable rate or at a profit. Even if the same company sells both gas and electricity, which is not the fact as to the complainant, it is constitutionally entitled to charge reasonable rates for each, and electric consumers could
84 not be made to bear the burdens of a confiscatory rate for gas (Municipal Gas Company v. Pub. Serv. Comm., 225 N. Y. 89). The rate for electricity within the City of New York is regulated by the defendant Public Service Commission for the First District, and it is presumed reasonable unless and until the contrary has been shown in a proper proceeding (Municipal Gas Company v. Public Service Commission, supra.) Under the authorities, the complainant company appears entitled to have the rate

chargeable by it for gas kept adequate, without regard to the rate charged for electricity by companies in which it owns stock control. Moreover, the Legislature has seen fit to provide separate regulation of gas and electric lighting companies. It has not regulated a lighting and heating company as such. It has itself fixed a certain price for gas supplied in the Borough of Manhattan, and has said that the price of electricity shall be regulated by the Public Service Commission. I therefore ruled throughout the trial that I would not take proof as to profits derived from the electric business as bearing upon the losses sustained in the gas business.

Manufacturing Plants Used in the Complainant's Gas Business.

Upon organization the complainant came into possession of a number of gas manufacturing plants, some making coal-gas and some water-gas. Of these plants only four remain: the 14th and 42nd Street coal-gas plants and the 21st and 99th Street water-gas plants. The total maximum daily gas capacity of these four plants is 43,500,000 cubic feet a day, but for some years past the 14th and 42nd Street coal gas plants have not been regularly operated. They have been fired up every winter in anticipation of a possible demand which would require an output at those plants, but except for the winters of 1919 and 1920, very little gas has been made in
85 these two plants for some years, so that the complainant company for some years past has only manufactured in its own plants a maximum of approximately 34,000,000 cubic feet. In 1918, out of a total of over 18,000,000,000 cubic feet of gas sold, it only made in its own plants about 8,000,000,000 cubic feet, the balance of the gas coming from the New York Mutual, the New Amsterdam and Astoria companies. During the first eight months of 1919, out of a total of over 12,000,000,000 cubic feet sold, a little over 4,000,000,000 feet was made by the complainant company, the rest coming from other sources.

The New Amsterdam Company has a manufacturing plant at Ravenswood, Long Island, and brings its gas over to Manhattan by way of a tunnel called the "Ravenswood Tunnel" which was built by the East River Gas Company, all of the stock of which is owned by the New Amsterdam Company, practically all of the stock of the latter company, as I have already stated, being owned by the Consolidated Company. The New York Mutual and Standard Gas Companies make gas on Manhattan Island.

Some time prior to 1906, the complainant company caused to be organized the Astoria Light, Heat and Power Company, and that company purchased a large tract of land at Astoria, Long Island City, and constructed from time to time coal and water-gas units until it had in operation for some years prior to 1918:

[illegible] A., coal-gas, with a rated daily capacity of 10,000,000 cu. ft.
[illegible] B., coal-gas, with a rated daily capacity of 10,000,000 " "
[illegible] C., water-gas plant, which originally had a daily capacity of 20,000,000 cubic feet and was subsequently increased to 30,000,000 " "

86 Contracts Under Which Gas is Procured from Other Companies.

The Consolidated Company apparently caused or procured the East River Gas Company to build a tunnel known as the Astoria Tunnel from Astoria to a point in the Borough of The Bronx, in order to convey the gas made by the Astoria Company across the East River and thence to Manhattan. For some years prior to 1918 the complainant company had the problem of keeping all of these plants working. The complainant company entered into what is called "agency agreements" with the Standard, the New York Mutual and the New Amsterdam, pursuant to which there was an exchange of gas between the Consolidated Company and its subsidiaries on the basis of station cost plus ten per cent; and the complainant company also made an agreement with the Astoria Company, pursuant to which it agreed to take all of the output of the Astoria Company at station cost, plus taxes, insurance, administration and other expenses, and 7 per cent return on property investment.

Subsequent to the original arrangement with the New York Mutual Company that agreement was amended so that for several years past in addition to cost plus ten per cent the Mutual Company has been paid by the Consolidated Company a return on investment, on the theory that the Consolidated Company actually used a certain part of the plant capacity of the Mutual Company.

Of course, all these agreements made by the complainant company with its subsidiary companies are practically agreements made with itself and must be very closely scrutinized. So far as the agreements between the complainant company and the New
87 Amsterdam, Standard and Mutual Companies, which provided for a cost plus ten per cent basis, there can be no criticism. That was unquestionably a fair basis. Nor is the amended Mutual agreement to be criticized. A rather different situation is presented as to the Astoria Company. That company is operated under the direct control of the complainant company, virtually as a "manufacturing department" of the complainant, to adopt the phrase of Mr. Maltbie, who testified for the defendants. During 1918 and 1919 gas production at Astoria was curtailed somewhat by the United States Government's use of a part of the coal-gas plant for carbon manufacture for war purposes in 1918, the recurring inability to obtain adequate deliveries of bituminous coal, and, during the summer periods of "off-peak" demand for gas, the adjustment of Astoria production so as not to interfere too much with the continued operation of the Manhattan plants and the permanency of their labor forces. The operating executives of the complainant testified that it was more economical and highly advisable to keep the 99th Street and 21st Street plants going to a lessened capacity during mid-summer, even though this involved curtailing the possible production of gas at Astoria.

The general method pursued by the complainant company in

the operation of its business and in the keeping of its books has been to charge as an operating expense the cost of the gas which it obtained from other companies. This cost from the Astoria Company included a percentage of cost of maintaining the various tunnels and return on investment thereon, and the books, records and accounts of the complainant company present, therefore, a most complicated system requiring close analysis and allowing, as accounts of this kind usually do, a variety of conclusions drawn by various experts representing the different interests.

88 Plant Capacity Required for Complainant's Consumers.

In reaching a conclusion in this case, therefore, I have not attempted to follow the paths of any of the parties to the action. The outstanding feature of the case to me has been that this complainant company is under obligation to sell a twenty-two candle power gas in the quantities demanded by its consumers.

The complainant company must be prepared to make between 18 billion and 19 billion cubic feet of gas this year and must be prepared to make and send out probably 100,000,000 cubic feet of gas in one day before the end of this year. To make this quantity of gas requires plant capacity. The complainant company now has a plant capacity on Manhattan Island of 43,500,000 cubic feet daily. It has a plant capacity in Astoria of 50,000,000 cubic feet and is now constructing an additional 30,000,000 cubic feet water-gas plant so that it will have in all 123,000,000 cubic feet maximum daily capacity or about 23,000,000 cubic feet more than it will probably need on any one day in 1920 or in 1921. But the witnesses all agree that in extending a gas plant the reserve capacity must be somewhere between 20 per cent and 25 per cent and that when this reserve capacity gets down to about 5 per cent, additional capacity must be provided. It is expected that this additional gas plant in Astoria will be in operation in time to meet the winter demand of 1920, so that at that time all of the gas required by the complainant company can be made at Astoria and at the four manufacturing plants on Manhattan Island.

89 The 14th and 42nd Street Plants.

Counsel for the defendants insisted that the 14th and 42nd Street plants were not used or useful and should be disregarded in all my calculations.

I agree with the complainant company that it probably could not have secured a permit to build any more manufacturing plants on Manhattan Island, and was therefore compelled to go to Astoria.

In my opinion it was not bad judgment for the Consolidated Gas Company to retain the 14th and 42nd Street coal-gas plants. The evidence submitted would tend to show that there is a real danger of a shortage in gas oil, in which event the complainant company will find itself compelled to look to the coal-gas plants, and if these plants had been discarded, other plant capacity would have been required.

Proof of Required Quantities of Materials and Labor.

The methods of making coal and water-gas, the kind of material necessary, the character of labor required, and the character of residuals produced were conceded. Quantities and prices, however, were disputed.

Bearing on this question, I had the testimony of Mr. Woods, an expert engineer with many years' practical experience, and also of Mr. Little. I also had before me the operating ledgers and other books of account of the complainant company and of the Astoria Company for the year 1918, and for the first eight or ten months of the year 1919. In connection with these books, testimony was adduced as to the manner in which they were kept. From time to time great quantities of vouchers of various kinds were brought into Court. The books themselves are kept in conformity
90 with the rules and regulations of the Public Service Commission for the First District, which has regulatory powers over the plaintiff company under the Public Service Law of the State of New York. I personally visited the Astoria Works, accompanied by counsel for the various parties. I was convinced that these books accurately reflected the operations of the complainant company and the Astoria Company. They are kept in infinite detail.

Counsel for the defendants strenuously objected to my receiving these books in evidence. The defendants were afforded the fullest opportunity of not alone examining these books in advance of their being offered, but after they were offered, the defendants were afforded the opportunity of examining all the underlying data, vouchers, reports, receipts and other papers that might bear upon the accuracy of these books. Taken in conjunction with the testimony of Mr. Woods and of Mr. Little, as to the character and quantities of materials and labor necessarily used in the manufacture of gas, I think that the record shows beyond question just what, in the actual operation of gas plants, is required for the making of gas and the cost thereof.

Cost of Manufacture in 1918 and Eight Months of 1919.

In my findings I have set out in detail the various elements entering into the manufacture of gas and it is unnecessary for me to refer to them again in this opinion. Suffice it to say that the books of the complainant company show that, excluding gas storage expense, the actual cost of making water-gas at its 21st and 99th Street plants in the year 1918, was 42.66 cents per thousand cubic feet of gas made, and for the eight months of 1919, it was 48.43 cents. The Astoria records show that for the year ending December 31, 1918, the actual cost of making water-gas in Astoria was
91 40.54 cents and for the eight months ending in August, 1919 was 45.75 cents. Mr. Woods figured the cost of water-gas in the month of October, 1919, at 47.07 cents. In some instances his cost of materials was somewhat higher than the average cost to

the companies as appearing from the books for 1918 and 1919, and in some instances he estimated a somewhat larger quantity than actual operations showed was used. In this connection, it should be noted that the quantity used varies in the different plants, and sometimes in the same plant on different days. Having in mind that the plaintiff must prove its case beyond any reasonable doubt, I reached the conclusion that the safest basis upon which to work was the actual result of operations in the Astoria plant for the eight months ending August 31, 1919, that plant being a most efficient manufacturing plant with modern labor-saving devices. The Astoria books of account, manufacturing records and supporting data for this period were placed in evidence by the defendants as a part of their case, and were tabulated and analysed by the defendants' accountants, as well as by the representatives of the complainant in rebuttal. On a basis of the prices and costs during that period of 1919, the actual cost of making coal-gas, excluding storage, was 47.31 cents. The actual cost of making water-gas was 45.75 cents. On the basis of the quantities produced the cost per thousand cubic feet of mixed gas was 46.40 cents per thousand cubic feet, and on the basis of 78 per cent water-gas and 22 per cent coal-gas prevailing in the gas sales of the complainant as of September, 1919, the cost was at least 46.09 cents per thousand cubic feet of gas made.

92 Increases in Manufacturing Cost Since Early 1919.

To my mind it is impossible for anyone seriously to dispute that figure. I have therefore found as a fact that the cost of making gas at this time is not less than 46.09 cents plus one cent storage expense, making 47.09 cents for gas made. That was the average cost for eight months in 1919. Since that time the price of oil has gone up. The price of coal has gone up. The price of labor is constantly going up. Any figure beyond the figure shown by actual operation for the first eight months of 1919 would be speculative, and I have avoided basing any conclusions on fragmentary or incomplete data of operations. It is beyond the shadow of a doubt that the materials and labor going into the manufacture of coal and water-gas today, making allowance for the residuals produced, cost the complainant company, no matter how or where the gas is made, at least 47.09 cents per thousand cubic feet.

"Gas Unaccounted For."

It is conceded by everybody in the case that a certain percentage of gas is lost; that is, it disappears by reason of leaks, slow meters, condensation, variations of temperature, and the like. The question as to the amount of this "unaccounted for gas," as it is called, was sharply litigated. After listening to the testimony given by Mr. Woods and by the defendants' expert, Mr. Little, and after analyzing the various reports of the various companies and the experiences of various companies, and the explanations of Mr. Woods and the statements of Mr. Little with reference to it in this and other cases, I am

satisfied that 7 per cent of the gas made must be figured as unaccounted for gas. Upon this basis, therefore, the gas sold
93 represents 93 per cent of the gas made. The gas made costing 17.09 cents per thousand cubic feet therefore represents, in my judgment, beyond any doubt, at least 50.63 cents per thousand cubic feet for gas sold.

Complainant's Claim as to Present Cost of Manufacture.

Counsel for the complainant asks me to find the present station cost of gas sold to be 56.06 cents, on the basis of 22 per cent coal-gas and 78 per cent water-gas prevailing in the gas sales of the complainant company as of October, 1919. He reaches this figure on the basis of what he claims to be proof in the record as to the present cost of oil, coal and other materials. I am inclined to believe that he accurately states the figures upon the basis of actual prices paid in October, 1919, and upon some proof in the record as to contracts since made for oil. I have refused to find, as requested by him, because as indicated, I prefer to base my decision upon actual results of operation, with the additional statement that the cost today is substantially higher than it was during the first eight months of 1919.

Suggestions of Substitute Methods of Manufacture.

Counsel for the defendant Swann offered the testimony of Mr. Little for the purpose of indicating how the complainant might make gas by the coke oven and chamber oven processes at a less cost than the present method of manufacture. I was much impressed with Mr. Little and the testimony given by him, but I do not think that this company can be required to invest, at this time of high prices and of labor difficulties, a very large sum of money in these
94 methods of gas manufacture, with the possibility staring it in the face of not being able to sell the greatly increased quantities of coke which would be produced as a result of such methods of manufacture; for it is conceded that unless Mr. Little's judgment is right as to the ability to sell coke, his plans must be disregarded. In this connection it should also be noted that Mr. Little, on cross-examination, admitted that he would not advise the complainant's executives to undertake the installation of a plant of this character now or under the conditions prevailing for several years. Moreover, for several years the complainant company and the Astoria Company have experienced great difficulty in obtaining the quantity of bituminous coal required for their present mode of making coal-gas. They have received only about sixty per cent of the quantity desired and contracted for by them. During the past winter, and at other times previously, the generation of coal-gas in the Astoria plant has had to be curtailed because of the inability to obtain coal. Under such circumstances, the introduction of a mode of manufacture depending on greatly increased quantities of coal in proportion to the gas produced for sale, has not commended itself to the complainant's executives.

Renewals and Replacements.

We then have the question of renewals and replacements. Counsel for the complainant asks me to find that this item of expense is at least three and a half cents (3½¢) per thousand cubic feet. He contends that the record shows that the actual cost is about that figure. His contention, however, is based upon the renewals and replacements of the Manhattan plants. I think a better result will appear when the Manhattan and Astoria plants are combined;
95 and in my judgment, as I have indicated in my findings, three cents per thousand cubic feet will fairly cover the item of renewals and replacements.

Expense of Maintaining Transmission Facilities.

Another item which must be added to the cost of gas sold is the expense of maintaining the Astoria Tunnel. As I have already pointed out the complainant company was practically forced to go to Long Island City to make its gas, and is therefore compelled to use a tunnel to convey gas to Manhattan. That tunnel is under water, requires a great deal of care and attention and constant repairs, with the necessary materials and labor. Based on the charge made by the Astoria Company for the year 1919, the cost of maintaining the tunnel is one cent per thousand cubic feet sold.

Present Cost of Taxes Levied by Public Authority.

There must also be added to the cost of making and distributing gas certain taxes assessed against the complainant company. I have reported the tax item to be 7½ cents per thousand cubic feet. I reached that figure in the following manner:

The record shows for the year 1918 taxes assessed against the complainant company were as follows:

New York State Gross Earnings tax	$78,473.86
New York City Special Franchise tax	384,297.90
New York City Real Estate of Corporations tax	155,122.20
New York City Real Estate tax	462,171.55
New York City Personal tax	23,300.00
United States Capital stock tax	24,807.38

96 For the same year the Astoria Company had the following taxes assessed against it:

Real Estate	$345,953.30
Gross Earnings	31,516.10
Person	11,157.41
Capital Stock	8,541.50
Excess Dividends over 4%	6,000.00
Special Franchise	321.73
Federal Income	192,594.01

If the plants be consolidated the gross earnings tax of the Astoria Company would be eliminated. Likewise the tax on excess dividends over 4 per cent. Likewise Federal Income tax. The capital stock tax of the complainant will remain the same, leaving the following items to be taken as taxes assessed for the year 1918 on the entire property:

New York State Gross Earnings tax	$78,473.86
New York City Special Franchise tax	384,297.90
New York City Real Estate of Corporations tax	155,122.20
New York City Real Estate tax on Manhattan properties	462,171.55
New York City Real Estate tax on Astoria property	345,953.30
New York City Personal tax, Manhattan	23,300.00
New York City Personal tax, Astoria property	11,157.41
Astoria Special franchise	321.73
U. S. Capital Stock tax	24,807.38
To this must be added the tax on Astoria tunnel of	123,022.59
Making a total of taxes assessed, taking the year 1918 as the basis, of	$1,608,627.92

This divided by 19,000,000,000 cubic feet, which I take to be the maximum for 1920, gives 8.5 cents per thousand cubic feet. But counsel for the defendants contend, and I think correctly, that the item of $155,122.20 real estate of corporations tax must be
97 disregarded. Mr. Sangster points out, that as against the item of $345,953.30 tax on real estate of Astoria for 1918, only $264,700.15 was paid, and in 1919 only $307,819.36 was paid. The record shows that franchise taxes are usually reduced. On the other hand, if the complainant be permitted to earn a fair return some tax items may be increased. On the same basis of 19,000,000,000 cubic feet for 1920, 7.5 cents per thousand cubic feet, gives me $1,425,000 as the tax item instead of $1,608,627.92, making a difference of $183,627.92.

It is impossible, I think, to figure the tax item any closer than I have done, I am convinced that in reaching the figure of 7.5 cents I have fixed a figure which, in all probability, experience will show to be the exact cost,—at any rate, so close to it as to be fair to both the public and the complainant company.

Cost of Distribution.

"Cost of distribution," which must be added, covers many items under the Uniform System of Accounts, not all of which are strictly distribution costs. The complainant company does a very large business in the sale and renting of gas appliances, and in that connection much publicity and promotion work must be done. The cost of doing this work is included in the cost of distribution. One of the

items in the list of items making up cost of distribution (salaries, general office) led to considerable argument on the hearing before me. The complainant company, as I have already indicated, is not alone a manufacturing but a holding company. It owns capital stock and securities of a number of other companies. It is contended on the part of the defendants that at least one-third of the general officers' salaries should be deducted because these gentlemen
98 devote their time not alone to the affairs of this particular company but to the affairs of the companies the stock of which is owned by the complainant company. The officers of the complainant company on the other hand insist that they take no active part in the operation of any of the other companies; that the other companies have their own executive officers; that if this company sold all of the securities which it owns of other companies their work would be precisely the same and the expense of running the company would be precisely the same. I was not able to agree entirely with the contention of counsel for the complainant in this regard nor am I able to agree entirely with the claim of the defendants that this and some other items should be reduced one-third. There are some items, too, like legal expense and entertainment expense, that are disputed. It is difficult to know just where to draw the line. The entire cost of distribution in 1918 was 19.78 cents per thousand cubic feet of gas sold; for the first eight months of 1919, 21.10 cents for the twelve months ended October 31, 1919, 22.09 cents.

Complainant's Claim as to Present Cost of Distribution.

Counsel for the complainant company urges that I find the distribution cost, as of October, 1919, and the present time, to be not less than 23.30 cents per thousand cubic feet of gas sold. Messrs. Carter and Woods, while on the stand as witnesses for the complainant late in the trial before me, gave testimony and presented computations by which they reached the conclusion that under present rates of pay and the present prices of materials and supplies, the distribution cost of 21.10 cents in early 1919 has become at least 23.30 cents.
It is of course true that the Distribution Department has en-
99 joyed no immunity from the effects of the mounting costs of labor and material, and I am inclined to believe that these witnesses accurately stated a ratio or extent of increase in costs which has taken place in this department since 1918 and early 1919. Clerk hire has gone up; stationery costs more; salaries of other employees have gone up, and on the whole, I believe, if fair allowance be made for all of the items in dispute, that in the business of this complainant company all of the items included under the head of distribution cost cannot possibly be kept below twenty cents per thousand cubic feet, and in reaching my figures, I have taken that figure as the cost of distribution. I have refused to find as requested by counsel for the complainant because, as indicated, I prefer to base my decision upon actual results of carrying on the business during periods for which complete figures are before me, with the additional

statement that the cost today is substantially higher than it was in 1918 or the first eight months of 1919.

Deduction for Miscellaneous Operating Revenue.

As against the various items making up the cost of distribution totaling 20 cents, there must be a credit arising out of miscellaneous operating revenue, such as rent from gas appliances, profit on the sale of gas appliances, and other items which in 1918 aggregated 7.28 cents per thousand cubic feet and for the first eight months of 1919 showed 6.62 cents. I have taken an average of 6.95 cents, as warranted by all the evidence.

100 Compliance with the 22 Candle-power Statute.

Upon the hearing before me the contention was made by the defendants that the complainant company had violated the provisions of Chapter 125, Laws of 1906, as to candle power and as to pressure. The statute under consideration requires the complainant to furnish to its consumers gas of an illuminating power of not less than twenty-two sperm candles of six to a pound burning at the rate of 120 grains of spermaceti per hour tested at a distance of not less than one mile from the distributing holder by a burner consuming five cubic feet per hour; and it was claimed by the defendants that this provision of the statute was violated by the complainant in that it did not furnish the quality of gas required by the statute. In support of their contention, the defendants offered in evidence and I received, the sworn reports of city inspectors of the calculated results of observations made by them at two city testing stations, as well as certain test sheets showing the basis of their computations. This proof covered the years 1916 to 1919, inclusive. As to part of this period, namely, the time during which the United States War Department stripped the gas of the light oils, the gas furnished to consumers was concededly of less than twenty-two candle power; but as to this period, I find as a fact that the complainant company acted under compulsion in time of war, and that were it not for the action of the United States Government officials the gas would have been in conformity with the statute.

As to the balance of the time, I am satisfied that the complainant made every effort to comply with the statute. There were
101 some days when the gas did not test up to twenty-two candle power; but this may have been caused by conditions not to be foreseen and it may have been due to the unreliability of the tests made. I am not at all satisfied that the city inspectors were in all cases correct in their observations. The gas was not tested in the manner which the statute seems to require. It is unnecessary for me to go into the details of this gas testing. Much depends on the accuracy of the vision of the testing observer. It appears to be conceded that in order to make a twenty-two candle power gas it should be made of a twenty-three and a half candle power at the works. I am satisfied that the gas made by the complainant company was

always at least twenty-three and a half candle power. In this connection I was much impressed with a report made by Mr. Hine when connected with the Public Service Commission, as a result of which an order was made by the Public Service Commission on the 13th day of October, 1917. Accompanying the order of the Commission (Case No. 2235) is an opinion by Mr. Oscar S. Straus, the Chairman, in which he refers to the work done by Mr. Hine. I quote from the opinion of Mr. Straus:

"By authorization of the Commission Mr. W. F. Hine, its Chief Engineer has established testing stations throughout the city and from January to the present time (tests were made from January 1st to August 31), has supervised tests in these stations, as well as secured the results of tests conducted in testing stations maintained by the city under procedure agreed to. The result of these tests, down to and including August 31st are set forth in Exhibit 1 herein."

Exhibit 1 shows that between January 1st and August 31, 1917, at the Grand Street testing stations 87 tests were made on Branch 1; 86 on Branch 2 and 87 on Branch 3, and the average candle power as to each branch was 22 or over, the highest being 24.2 and the lowest being 19.4. At the 79th Street testing station 133 tests were made on Branch 3; 132 tests on Branch 4 and 132 tests on Branch 6, the average of all was 22.6 candle power, the highest being 24.3 and the lowest being 20.5. At 59 Walker Street 162 tests were made which showed the highest candle power 24.9, the lowest 19.8 and the average 22.2. At all testing stations Consolidated gas was tested 819 times the highest test showing 24.9, the lowest 19.4, and the average 22.3. I have accepted this report of Mr. Hine as being more reliable than the tests produced in evidence, and I therefore have found as a fact that the complainant company has complied with this standard requirement of the statute.

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The Candle-power Standard Useless and Wasteful.

In this connection I feel called upon to say that the record in this case discloses the fact that this candle power standard has no place on our statute books. It is agreed by everybody that the 22 candle power requirement is a useless requirement, wasting the money of this company, and of the public. In no other place is this requirement in vogue. Since electricity has come to be used as it has for illuminating purposes, gas is no longer considered an illuminant but is used for heating rather than for lighting purposes. The important quality of gas therefore is its heating power, not its illuminating power. The time has come (in fact had arrived many years ago) when this statute should be repealed and the matter left with the Public Service Commission to determine the heating quality of the gas to be furnished to consumers. It will cost less to make a gas of a heating quality accepted in most jurisdictions than it does to make a 22 candle power gas, and the quicker the standard is changed the sooner will the public be able to get gas at a price less than must necessarily be charged at this time for 22 candle power

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standard if a reasonable return is to be allowed the complainant company.

Compliance with Pressure Requirements.

It was intimated on the hearing before me, though not alleged, that the complainant company in some manner had violated the pressure requirements of the statute. It was also intimated, though not alleged, that the complainant company had also violated some order of the Public Service Commission as regards pressure. No order of the Public Service Commission on this subject was produced. The only proof offered was through the witness Edgerton who attempted to testify to something he saw at the pumping stations from which he wanted to draw the inference as to conditions in the service mains. This proof I declined to take. There is no evidence in this case that the complainant company did not comply with the pressure requirements of the statute or of any order of the Public Service Commission.

The General Office Building.

Another matter which I should perhaps refer to in this opinion is the question of the general office building at 15th Street and Irving Place. That building was erected some years ago with the idea apparently of having a home for the general offices of the complainant company. It has a large auditorium where meetings are held; a restaurant on the top floor for the accommodation of em-
[91] ployees and tenants; a central telephone exchange; rest rooms and other conveniences of that character. The cost of constructing this building compared with present conditions was very modest. The complainant company, in accounting for revenues from the building and expense of operation follows the theory of dividing the invested capital between the gas making business and non-gas business on the basis of the portion of the building occupied by other tenants and prorates the expense of operation accordingly. The defendants contend that the entire building should be taken in as invested capital and the account be credited with all of the receipts of rent from other tenants and in addition thereto insist that the space used for auditorium, restaurant and the like should be rented out so as to increase the revenues and profits of the building. I have given this matter a good deal of thought and I believe that the fairest way of handling the situation is the way it has been handled by the complainant company. The net cost to the complainant for office space is less than it would have to pay if it rented space in a building owned by some one else. I see no ground for disturbing the figures of the complainant company with regard to the 15th Street building.

The 57th Street Branch Office and Display Room.

The learned Attorney-General took exception to the 57th Street office building and offered evidence tending to show that the branch office at 57th Street could have been handled more cheaply in some

other way. I believe the officers of the complainant company reached the conclusion they did in good faith and that the cost to the consumer is no more than it would be if the company had hired office space in a building not owned by them in that neighbor-
105 hood. I have declined therefore to interfere with the judgment of the officers of the complainant company in that regard.

Other Parcels Contested by Defendants.

Leaving aside for the time being the 14th and 42nd Street plants which are claimed by the defendants not to be useful in the gas business, and which I have already discussed, there are some other pieces of real estate which the defendants insist should not be continued in the fixed capital amount. If these parcels were all thrown out of calculation it would make no material difference in the net result. The company officials insist that every piece or parcel still owned by the company is used and useful. There is evidence supporting the contention of the complainant company, and I decline to substitute my judgment for the judgment of the operating officials of the complainant company.

Reasonable Rate of Return.

The question of the amount of the return to which the complainant company is entitled was sharply litigated before me. The United States Supreme Court in deciding the suit brought by this company in 1906 (Willcox v. Consolidated Gas. Co., 212 U. S. 19) rather indicated that 6 per cent. was then a fair return on the value of the property used in complainant's gas business. Since the decision of the prior suit in 1909, there has been a very radical change in business conditions. The investment market of the world is on an entirely different basis than that under consideration by the Court in 1909. Taking into consideration all of the factors which the Courts have indicated as entering into the determination of a reason-
106 able and proper rate of return upon capital employed in supplying gas to the public, I am of opinion that this complainant company is entitled to receive a return of at least eight (8%) per cent. on the value of the property used in its gas business.

The Value of Property.

As to the value of property the Supreme Court of the United States in the prior suit of this complainant said:

"There must be a fair return upon the reasonable value of the property at the time it is being used for the public" (p. 41),

and further on, on the same page, the court says:

"In order to determine the rate of return on the reasonable value of the property at the time it is being used for the public, it, of

course, becomes necessary to ascertain what that value is. A very great amount of evidence was taken before the Master upon that subject, which is included in five large volumes of the record. Valuations by expert witnesses were given as to the value of the real estate owned by the complainant and as to the value of the mains, service pipes, plants, meters, and miscellaneous personal property.

"The value of real estate and plant is to a considerable extent matter of opinion, and the same may be said of personal estate when not based on the actual costs of material and construction. Deterioration of the value of the plant, mains and pipes is also to some extent based upon opinion. All these matters make questions of value somewhat uncertain; * * *"

The Value of Franchises and Rights.

As I read the opinion of the court in that case, the Court
107 refused to disturb the value of $7,781,000 agreed upon as representing franchises. I quote from page 47:

"We think that under the above facts the courts ought to accept the valuation of the franchises fixed and agreed upon under the Act of 1884 as conclusive at that time. The valuation was provided for in the Act, which was followed by the companies, and the agreement regarding it has been always recognized as valid, and the stock has been largely dealt in for more than twenty years (now thirty-four years) past on the basis of the validity of the valuation and of the stock issued by the company."

Unless therefore there is force in the contention made by counsel for the Public Service Commission that one of the principal franchises included in this valuation has expired and that therefore that value no longer exists, I feel bound to accept that value of $7,781,000 for franchises.

The Claimed Expiration of the "Anthracite Grant."

Counsel for the Public Service Commission points out that included among the franchises transferred to the complainant company on organization was a franchise to the Anthracite Gas Lighting and Heating Company. That company was organized under the General Manufacturing Act of 1848; it obtained from the State a perpetual franchise to operate in the City of New York, subject to obtaining a license or franchise from the City of New York to lay its mains and pipes in the city streets. By resolution of the Common Council of the City of New York adopted September 17, 1863, it was granted "the right to lay pipes and mains" for a period of fifty years. Counsel for the defendants contend that this li-
108 cense expired in 1913; but since then the complainant company has maintained its pipes and mains in the streets, and, so far as the record shows, has relaid pipes and mains where necessary; no action has been taken by the City of New York to disturb

the complainant's rights in the streets, and, so far as the record indicates, the City of New York still acquiesces in the complainant's rights therein. So long as the complainant is enjoying possession of the rights granted and is not disturbed, I think that for the purpose of this case the right must be deemed to be existent as if it had been extended or renewed by formal resolution, and that it must still be included as one of the franchises for which a value of $7,781,000 was fixed in 1884.

Standards of "Value of Property" in Rate Cases.

This brings me to the question of the value of the remaining property, including operating plants, mains, services and the like. The cases speak of the value of the property but fail to differentiate between one kind of value and another. Property has different kinds of value; it has a scrap value; it has a going value; it has a peculiar value to a person desiring to purchase; it has a rather different kind of value where the property is condemned for public use and the owner is compelled to build a new plant elsewhere, and in case of fire. In the case of a fire loss or a condemnation of the property for public use the owner of the property is at once confronted with the problem of replacing the plant and his loss undoubtedly is the cost of reproduction new at that time, less observed or actual depreciation. But in a case of this character that rule would be unfair to the public.

In fact, the complainant did not undertake, for the pur-
109 poses of this case, to prove the present reproduction cost of its property, which it said would be in excess of $150,000,000. As to its land unimproved, it presented the testimony of the Deputy Tax Commissioners of the City of New York, the officials chosen by civil service examinations to make valuations of real property and sworn to assess such land at the full sums for which it, or similar parcels, would, under ordinary circumstances, sell, if wholly unimproved. Aside from this $11,970,185 of present value of land, the complainant contented itself on its direct case by showing the inventories and appraisals made of its properties in 1906 for the prior suit, the unit prices applied then to the properties inventoried, and the extent to which the properties then inventoried are now in existence and use by the complainant. Proof was then offered showing that the present unit prices for such materials, labor, and the like, are substantially higher than those used in 1906. On this basis, I was asked to find that the present reproduction cost of the property used in 1906 and still in use is at least as much as the sum at which it was appraised in 1906, and that property added since 1906 is now worth at least as much as it cost when erected and installed. Although I have no doubt that the present reproduction cost would be at least as much as the sum thus arrived at, for reasons elsewhere indicated I feel on sounder and fairer ground in basing my conclusions upon the actual investment in the property, proof of which was offered in the first instance by the defendants and by the complainant in rebuttal.

Cost of Plants per Unit of Capacity.

The various properties owned and used by the complainant company were acquired from time to time over a long period of
110 years; a considerable part of them since 1884. For several years past the cost of labor and materials has been such that o reproduce the property of the complainant company, even with llowance for any deferred repairs and maintenance and deferred renewals and replacements of property, sometimes referred to as "observed depreciation", would cost very much more than the actual investment of the complainant company in these properties. As far back as 1886, Mr. Edgerton figures a water-gas plant worth about $150 per thousand cubic foot capacity, and a coal-gas plant at some $225 to $250. Apparently engineers through the years have figured a water-gas plant, excluding land, as worth about $150 per thousand cubic feet of daily capacity, and a coal-gas plant about twice as much. The testimony in this case was to the effect that a coal-gas plant now costs from two to three times as much as a water-gas plant. Several times as much land is required for a coal-gas plant as for a water-gas plant. Mr. Woods, the engineer of the defendant company, figuring the value of the New York Mutual plant for the purpose of inter-company adjustments long before the question came before me, fixed the value of the New York Mutual plant on Manhattan Island, including land, at $205.72½ per thousand cubic feet.

Actual Investment Not in Excess of Cost of Such Plants Before the War.

The actual investment of the Astoria Company, exclusive of working capital, is in excess of $15,460,000. Included in this is about $3,300,000, representing the original cost of the land (plus grading and filling), and of the construction of docks, wharves, and the plant railroad, leaving as the actual original cost of building the Astoria gas-plant, long prior to the world war, about $12,160,000, ex-
111 clusive of land. This sum represents about $375 per thousand cubic feet of capacity for coal-gas units and about $150 per thousand cubic feet of capacity for the water-gas units. That is to say, taking 20,000,000 daily capacity for the coal-gas at $375 per thousand cubic feet, we get $7,500,000 and taking 30,000,000 cubic feet at $150 we get $4,500,000, making a total of $12,000,000 exclusive of land, the additional amount of $160,000 being for facilities which would be useful for contemplated extensions to the plant.

The 99th and 21st Street water-gas plants, exclusive of land, represent about $172 per thousand cubic feet of capacity. The fact that one of these stations has a capacity of about 5,500,000 would tend of course to raise the average cost per unit of capacity above that of such a plant as the 30,000,000 cubic foot water-gas plant at Astoria. The investment in the 14th and 42nd Street coal-gas plants, exclusive of land, amounts to about $356 per thousand cubic feet of capacity. Compared with the Astoria coal-gas units, the rela-

tively smaller capacity of these plants tends to a higher unit cost per unit of capacity, which, however, is more than offset by the greater investment in labor-saving equipment at the Astoria plant.

In other words, the original investment in the complainant's plants is not in excess of what such plants cost before the war. The total investment in the plant and property, including that for which stock was originally issued, but exclusive of franchise rights and working capital, after making a deduction for what is described as "jointly used property" owned by the complainant, is $38,675,393.99. On the basis of daily plant capacity of 43,000,000 cubic feet and only 10,000,000,000 cubic feet in sales that figure is slightly less than $1 a thousand cubic feet of sales. The fact is, that
112 figured in various ways, $1 fairly represents the value of necessary manufacturing and distributing plant for one thousand cubic feet of gas sold.

Present Value of Property Owned and Used by Complainant.

I am convinced that no matter how depreciation is figured on the cost of reproducing this property, and no matter what criticism be made as to the age of the 14th and 42nd Street plants, the fact remains that those plants are going, gas-producing plants, and that the 21st Street and 99th Street plants are gas-producing plants, and based entirely upon the capacity of the plants alone, plus the extent of the street mains, services, and other property, by no possibility could this property be reproduced, less depreciation, on any theory, for $38,675,393.99, made up as follows:

Real estate (including $3,119,634.26 for General Office Building)	$10,647,062.94
Manufacturing plants and holder stations	13,119,754.76
Services	1,272,241.74
Street mains	11,027,266.24
Meters	3,719,442.12
Cocks and connections	359,322.12
Furniture and fixtures	532,437.54
Horses, wagons and harness	5,747.80
Tools and implements	149,335.26
Scows	15,821.20
Gas appliances rented	1,711,935.46
Automobiles and accessories	137,412.82
	$42,697,780.00
Less portion of General Office Building and other property owned by complainant but jointly used by others	4,022,386.01
Total	$38,675,393.99

113 Reasons for Rejecting "Present Reproduction Cost" and Claimed Deduction for "Theoretical Depreciation."

In arriving at the value of the property necessarily used in the gas business of the complainant company, I have rejected the testimony and suggestions of the witnesses for the defendants that I ought to take the investment in the property, less a large amount for "theoretical depreciation". Much has been said and written on this subject, and I have read with interest the matter which has been called to my attention. I cannot escape the view that a property used for the service of the public in the operation of a public utility such as a gas company, if kept in good operating condition, must, in the nature of things, be worth to the public at least the amount honestly and reasonably put into the property. Nor can I escape the conclusion that any other method of arriving at the value of the property used in the public service must tend to unfairness, either to the consuming public or to the investors in the public utility corporation.

Take the case under consideration: I have found that, starting with the value of the property as fixed and agreed upon in 1884 and the issuance of stock at par upon that basis, and adding to that sum the amounts expended from time to time in installing new apparatus and facilities in existing plants and constructing new plants and facilities, and then deducting therefrom the cost of the property withdrawn from service since 1884, there is actually and reasonably invested in property used in the gas business of the complainant no less than $71,054,351.14, exclusive of mobile or floating assets, commonly called working capital. The plant, machinery and equipment used in the gas business of the complainant company
114 has been and is maintained in excellent operating condition; proper repairs, renewals and replacements have been made from time to time, and the same are now in as high a state of efficiency as if new. From every point of view which concerns or affects the consumers, the property for which this $71,054,351.14 was paid is rendering the same service today, and in some instances a little better service, than was contemplated or secured at the time the money was put in. Nevertheless, counsel for the defendants insistently urge that all return must now be withheld from a large part of that investment, and the amount of investment arbitrarily reduced, merely because some of the plants or some of the property in them have been in existence for some years. The complainant company, on the other hand, would find justification in the decisions of the Courts for a contention that the value of this property must be taken as of the present time and that I must fix this value upon the expert opinion as to the cost of reproducing the property as of the present time, in which event there would arise the question whether from such reproduction cost should be deducted the amount of any observable and actual deterioration or depreciation

"Present Reproduction Cost" Basis Unreliable and Unjust to Public or to Company.

If the complainant urged the present reproduction cost basis and I adopted that view, I would be compelled, in the first instance, to rely upon the testimony of hired experts on either side expressing views as to value—a method always unsatisfactory, at any rate to me,—and in addition thereto, I would find myself compelled to fix the value of the property at this time at a sum largely in
115 excess of the actual investment as above found. I feel that to do this would be unfair to the public, because on such a basis the consumer would be called on to pay the complainant company a rate yielding a return upon an amount of money never put into the property by investors, but representing only an appreciation in the cost of building such a property now, due to the conditions prevailing at this time.

On the other hand, if this suit were on trial in a time of low values and low construction costs, such as prevailed for a period immediately before the Great War, it might well be that the expert testimony would have called for a conclusion that on a reproduction cost basis the property used in the complainant's gas business was in such a time worth less than the actual investment therein. Here, again, the use of such a basis of present value would lead to an unjust result, this time to the complainant company, and to the investors in the property. Their money would be still in the project, and would have been expended in good faith for new construction at prices reasonable at the time when the work was done.

I am of the opinion that in cases of this character the value of the property used must be controlled by considerations less fluctuating and more closely allied with the interests of the consumer and investor alike. The value can remain substantially stationary only if it be correlated to actual, reasonable and honest investment. The costs of actually making and distributing the gas must, of course, fluctuate with the cost of materials and labor and the rate of return must vary with investment conditions, but if we once adopt a sound and ready means of ascertaining the value upon which the rate should yield a return, it becomes a simple matter to readjust
116 from time to time the rate charged so as to reflect changed costs of labor and materials and any changes in the proper rate of return.

Is the Present Price Level "Abnormal?"

Counsel for the defendants strenuously urge that we are now living in abnormal times. To some extent, I assent to that proposition, but the proof indicates that what some persons still refer to as abnormal times has become to others a high, new, normal level, which will continue for a comparatively long time to come. It is impossible to forecast now any probable time when the pre-war level of wages and material costs will be restored. Where counsel for the

defendants err in urging upon me the view that the price of gas should not be changed under present conditions, is in their failure to differentiate between the basis of valuing the property on which a return is to be allowed, and the basis of determining the actual cost of making and delivering the gas. Of course, as was pointed out by the learned Judge of the Court of Appeals who wrote for that Court in the Municipal Gas Company case, a mere temporary increase in the cost of production would not justify a destruction or suspension of the statute. No such situation is, however, presented here. As I have found, on the basis of the prices, rates of pay, and costs prevailing during the eight months beginning January 1, 1919, the cost of making and distributing gas has been such as to allow a very small, if any return, on even the actual investment; and since September 1, 1919, the cost of making and distributing gas has been increased in a number of respects so that the fair inference is that the complainant company now finds itself without any return upon the investment. The conditions found by me have existed
117 for more than a year last past, and to a lesser degree for at least a year before that time, and will continue for at least a considerable period of time, the end of which cannot now be forecast.

The Sound Basis of Complainant's Right to Relief.

Upon such a situation and such a prospect, I think that the complainant company has shown itself, clearly and beyond all reasonable doubt, entitled to relief from the statutory limitation on its rates, but that its rate of return should be calculated, not upon the present high reproduction cost of its property, with or without the deduction of observed or actual depreciation, in whatever manner computed, but upon the actual, reasonable investment in the property devoted to the service of the complainant's consumers. Taking the years as they come and go, of high construction cost and of law construction cost, the amount honestly and actually put into a plant and system of this character, represents a sum which fairly and reasonably should be taken as representing a minimum of its value to the public for use as a public utility. The only testimony offered before me to show the expenditure which would be necessary in order to put the plant, structures, machinery and equipment in condition substantially as good as when erected or installed, was that of Alten S. Miller, an engineer long familiar with these plants, now vice-president in charge of construction work for the Bartlett-Hayward Company of Baltimore. He testified that the outlay of approximately $322,000 for repairs, renewals and replacements would accomplish this result. For the reasons already reviewed, I have not considered this sum, or any other, as a proper deduction from the above-stated value of property.

118 Investment in Additional Property Required for Service of Complainant's Consumers.

And it is upon this same basis that I have taken the value of the Astoria plant and Astoria tunnel. There apparently was actually invested in the construction of the Astoria plant as of December 31, 1918, $17,169,342.57 and in the tunnel $5,178,614.58.

In order to meet the requirements of the public it is necessary to have additional capacity. We must either add to the invested capital the amount that Mr. Woods figures for part of the mutual plant capacity or make allowance for the additional plant capacity at Astoria. As I have disregarded all of the plants except the Consolidated plants on Manhattan Island and the Astoria plant for the purpose of reaching a conclusion in this case, I believe that there should be added to the invested capital one-half of the expense of the new 30,000,000 foot plant at Astoria, which will cost $4,500,000, half thereof being $2,250,000. Adding these three items of Astoria plant, Astoria tunnel and half of the additional 30,000,000 cubic feet to the item of $38,675,393.99 for property other than franchises and rights and $7,781,000 for franchises and rights, gives a figure of $71,054,351.14.

Working Capital.

In addition to these items it is conceded that the complainant is entitled to consider working capital as part of the invested capital. There was a sharp conflict between the witnesses as to the amount to be allowed for working capital. Mr. Carter, an officer of the
119 complainant company, testified that the working capital should not be less than $4,625,000, giving his reasons therefor. Witnesses called by the defendants testified to much lower figures, giving their reasons therefor. Mr. Little indicated that in his judgment working capital should represent about twenty cents per thousand cubic feet. For the purpose of determining the amount of working capital I have accepted Mr. Little's figure, which makes the working capital on the basis of 19,000,000,000 feet of sales as nearly as may be determined $3,800,000, making a total therefore of invested capital of $74,854,351.14 upon which the complainant is entitled to a fair return.

In Conclusion.

It has been my purpose in this opinion to give the court reviewing my findings as simple and yet as clear a picture as I can of what I conceive to be the important questions in this case. The record, as I have stated, consists of over 16,000 printed pages of testimony, in addition to which there is a very large number of exhibits, some of the exhibits consisting of large volumes of account books of the complainant and Astoria companies. To take up every argument and point of discussion presented to me in the course of this very long and arduous trial would be practically impossible within any reason-

able time. I have found, as stated, that the property of the complainant company is being confiscated to a very substantial extent. Every day that this continues, assuming the correctness of my conclusions, is an injustice to this complainant company. I have, therefore, deemed it my duty rather than to spend the time necessary to write a more detailed opinion, or to state the facts in greater detail than I have in my report, to present to the Court at the
120 earliest possible moment my report and opinion in the form now prepared, to the end that such disposition may be made of this case as the Court reviewing my report and opinion may deem wise and proper.

Respectfully submitted,

A. S. GILBERT,
Special Master.

Dated, May 5, 1920.

U. S. District Court, S. D. of N. Y. Filed May 6, 1920.

121 United States District Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York; Lewis Nixon, Constituting the Public Service Commission of the State of New York, First District, and Edward Swann, District Attorney of the County of New York, Defendants.

This is a suit in equity brought by a gas company in the City of New York to enjoin the execution by the defendants of Chapter 125 of the Laws of 1906 of the State of New York, which imposed on the plaintiffs, among others, a limitation of eighty cents in the rate which it might charge to consumers. The suit was begun in January, 1919, and made defendants the Attorney General of the State, the District Attorney of the County of New York, and the Public Service Commission of the First District, who are charged with the prosecution of violations of the statute.

A Master was appointed on May sixteenth, 1919, to take
122 testimony, make computations and report back to the court with all convenient speed. Over fifteen thousand printed pages of testimony were taken upon which the master has filed a report. More than one hundred exceptions have been filed to the report and the cause now comes on for hearing on these exceptions.

The suit is in sequence to a former suit under the same statute, begun on May first, 1906, against the predecessors of these defendants and the City of New York. This was also tried before a Master and argued before the Circuit Court, which granted a decree in favor of the plaintiff (Consol. Gas Co. v. New York, 157 Fed. R. 849). The defendants appealed to the Supreme Court, which reversed the decree and dismissed the bill, giving leave to the plaintiff,

however, to file a new bill at any subsequent time when experience might have demonstrated that the rate fixed by the statute was inadequate to a fair return upon the value of its property (Willcox v. Con. Gas Co., 212 U. S. 19). This decision was rendered on the second day of January, 1909, so that the defendant allowed ten years to elapse during which it operated under the statutory rate, before beginning this suit.

The bill is of the usual sort in rate cases, alleging that the rate is confiscatory in that it prevents a fair return upon the property of the company, that the penalties imposed by the statute are so large as to crush it in the event of disobedience, and that it has no means of testing the constitutionality of the Act except by a suit in equity. The jurisdiction of this court and the equity of the bill, if the allegations are maintained, is not disputed, and is amply supported by prior adjudications in similar cases.

The plaintiff is a corporation organized under the laws of the State of New York under Chapter 367 of the Laws of 1884, which
123 permitted the consolidation of six gas companies then doing business in New York City, all of which had been in existence for a long time, one of them as far back as 1823. At the time of the consolidation the value of the stock of the six companies as then quoted on the Stock Exchange of that city was close to forty million dollars. The stockholders agreed upon a plan of consolidation in accordance with the statute in which they fixed the value of their franchises as seven million, seven hundred and eighty-one thousand dollars, and the value of their other property at about thirty millions. For this stock in the amount of thirty-seven million seven hundred and eighty-five thousand dollars was issued, of which over two million was held in the treasury and the other thirty-five million issued directly to the stockholders of the constituent companies. The company began business in November, 1884, and the stock was increased in April, 1900, to fifty-four million five hundred and ninety-five thousand dollars, and later, in July of that year, to eighty million dollars. At the present time there is outstanding one hundred million dollars of capital stock and twenty-five million of seven per cent convertible bonds.

The Master found the value of the assets of the company, including its franchises, at about seventy-five million dollars, and its annual sale of gas at the present time about nineteen billion cubic feet. Upon this he found a probable income for the current year of about nine hundred thousand dollars representing not more than one and two-tenths per cent on the value of the property as found. He further found that the necessary rate of return at the present time was eight per cent, requiring an income of about six million upon the same value.

The Master found the net cost of delivering gas to the con-
124 sumer by the company was 75.18 cents a thousand cubic feet. This finding he based upon the full year 1918, and the first eight months of the year 1919, contenting himself with the statement that prices since August thirty-first, 1919, had become higher than during the period of twenty months which he had considered.

In view of the voluminous testimony and the great number of issues which are concerned, it would serve no purpose to recite in detail more of the findings or any of the evidence.

William L. Ransom, John A. Garver, Charles A. Vilas and Jacob H. Goetz, for the Plaintiff.

John P. O'Brien, James A. Donnelly, and Harry Hertzoff, for the Corporation Counsel.

Wilber W. Chambers and Clarence R. Cummings, for the Attorney General.

William Hayward, John Holley Clark, Jr., and Ely Neumann, for the Public Service Commission.

LEARNED HAND, *D. J.*:

This bill was filed under the leave given in Willcox v. Consolidated Gas Co., 212 U. S. 19, to begin a new suit of the same kind after a period of probation should have tested the adequacy of the rate established by the statute. Ten years passed before this was done, and the experience gained meanwhile would, under ordinary circumstances, have been sufficient. However, during that period there occurred the extraordinary rise of prices due to the Great War, which has made the future harder to forecast upon the basis of ten years' past experience, than could have been apprehended in 1909, and as a result, we are not in so good a position at the present time to judge of the future effect of the statutory rate as we should normally have been, i. e., the experience of the first seven of the ten years is of little present value.

125 The Proper Period for a Test.

The defendants wish me for this reason to take an average over the whole period both for cost of production and capital valuation. Now whatever may be the proper method, that certainly is wrong. The case is not one in which an average can safely be made, because the variations in prices which the whole period covers are not normally recurrent. Averages presuppose that the resulting figure will cover variations, which though certain or nearly certain within the period taken, are impossible of exact prediction in their occurrence. They may therefore be spread over a period precisely as an insurance loss is spread. The recent rise in prices is not of this kind, because there is no reason whatever to suppose that during the next period of say five years, which is long enough to justify some present action, the same causes will operate in reverse as have operated in the past. An average would be therefore meaningless. Either the evidence of the last three years is sufficient basis for a forecast, or it is not. If not, ante-bellum values should be used merely for lack of any better; if so, the average of the last three years is the proper basis.

It is quite true that if these prices could fairly be regarded as such temporary aberrations as the rate was meant to cover, this would not be so. Persons who embark their money in such enterprises must take the bitter with the sweet and the lean years with the fat. Rates

when established are not intended to make a nice adjustment to all ensuing conditions; they are too long and costly to fix, especially in court. In such cases it is fair to take a period of years as the defendants wish and to compare that with the rate. But if, as I
126 I think, we have now fair warrant for supposing that we are in a condition not contemplated at all, when the rate was fixed, all such considerations disappear.

Several reasons lead me to believe that present price-levels are not merely transitory, though I recognize the danger of any prophecy. Whatever their precise cause, it is universally conceded to be due to the Great War, and by that I mean of course not to the prosecution of hostilities, but to the economic exhaustion and inflation of the circulating medium which these involved. In general it is a safe inference to suppose that Europe will not be able to resume its ante-bellum production for a time measured rather by years than by months, and that the recovery of a sound financial condition will take longer. We in this country are not only influenced by conditions in Europe, but we are subject to our own local inflation and disorganization of industry, from which no one can know when we shall recover. The question is a practical one and comes, I think, down to this: the plaintiff is faced with a condition which permits it to receive much less than the return which the statute contemplated and which the constitution is thought to insure it. So far as human foresight can see, that condition, though probably not permanent,—certainly in its present exaggerated form,—is bound to exist over a period of some years, at least in such things as coal, oil and labor which are the plaintiff's chief costs. There is then the certainty of a continued loss for an indefinite but substantial time, due to causes which were not in existence and could not possibly have been apprehended fourteen years ago when the rate was fixed. Does this prospect justify the court in abandoning the inertia which it properly feels when the complaint is based upon temporary variations? Is it fair to continue to impose a rate which has clearly ceased to correspond with the underlying presuppositions upon which
127 it was based? I think that the prospect does justify the court and that the rate has become unfair, at least until the conditions change.

Three reasons justify this assumption now, each of them serving to protect the public against the consequences of a mistake. The first is that at worst the rate will not be finally declared insufficient. As in all such cases, the defendants will have leave at any time to vacate the decree upon showing that the old price-levels have been reached, or nearly enough to put again into effect the statutory rate. This does indeed impose a burden of proof upon the State when that time comes, but a denial of any relief now causes certain and irremediable damage to the company for so long as present prices remain. While constant readjustments are impracticable, and for this reason public service companies must endure transitory periods of insufficient profit, high and rising price-levels have already lasted a period of thirty months, January first, 1918, to August first, 1920; enough, I think, to throw the initiative upon the State of showing that condi-

tions have changed, when they do change. The second factor is the present discrepancy between the rate and a fair profit which gives a reasonable assurance that the period and the fall in prices must be substantial, before the rate can prove sufficient. It also makes more imperative some relief to the company. The third factor is that it is not in the least essential that the State should have recourse to the unwieldy process of a new suit, which an application at the foot of the decree in effect would be. The Legislature by an amendment to Section Seventy-two of the Public Service Law of New York may at any time give to the Public Service Commission jurisdiction over rates not only below but above the statutory maximum whenever the statute is in abeyance. Indeed that might have
128 been thought to be now the law, had the opposite not been declared in People ex rel. Municipal Gas Co. v. Public Service Commission, 224 N. Y. 156. By such a change the whole subject could be regulated by that authority to which, if I may say so, it properly belongs, and a procedure established plastic enough to make unlikely the continuance for fourteen years of a fixed rate in the face of changes such as have occurred.

So far as I have found in the books, a test of two years is enough. In the Minnesota Rate Cases, 230 U. S. 352, 469-472, the rate fixed by the authorities for the Minneapolis & St. Louis Railway, the only one disturbed, was set aside on an experience of only one year. In Municipal Gas Co. v. Public Service Commission, 225 N. Y. 89, 98, a complaint was sustained which alleged the insufficiency of a rate for a period of only two years, 1917 and 1918. In Darnell v. Edwards, 244 U. S. 564, the period was thought too short but in included only six months, and those not including the recent era of inflation. In Rowland v. St. Louis, etc., Co., 244 U. S. 106, a rate was upset upon a showing of only two months, coupled with opinion evidence of its being a fair test. Excepting these cases I know of no judicial ruling on what length of time is necessary.

The Master has taken complete evidence over a period of twenty months, from January first, 1918, to August thirty-first, 1919. Since that time eleven more months have passed, during which there has been no fall in price-levels. The record has some evidence of this down to a later day, but of course not down to the date of this opinion. But evidence is not necessary in the face of so patent and obtrusive a fact of daily life, and it is quite fair to say that the
129 condition which the master found as of August thirty-first, 1919, has been aggravated during the succeeding year. The period, despite its unusual character, I find to be a sufficient basis for the calculation of the cost of production and the "rate-base" for a future time long enough to call for some judicial action.

Computation of the "Rate-base"

I have just said that the present range of prices seems to me applicable not only to the cost of production but to the valuation of the "rate-base", i. e., the permanent means of production, and this necessarily involves a decision upon the vexed question as to the

values upon which the company is to be permitted to earn its profit. Costs of production involve those items which the company must pay before it begins to see any profit whatever; its economic motive for embarking in and maintaining the enterprise depends altogether upon the return which it can get out of the property which it has bought and erected into an industrial unit. Hence it is the profit and strictly speaking this alone, which matters with the stockholders. It must be owned that much of the discussion shows either a timidity or an inability to grasp any principle in dealing with the "rate-base". With deference it appears to me to be merely an abandonment of any attempt to deal intelligibly with the question to say that cost of reproduction and the original cost are each elements to be considered. That statement can mean nothing whatever unless it is accompanied by a constitutive rule which will establish some standard by which these may be used. It would be understandable to say that the two estimates should be averaged, but such a rule could obviously command no support, because it would correspond to no relevant considerations of policy. Merely to leave the question with a caution that several elements are to be con-
130 sidered is to abandon any effort to solve it

The recurrent appeal to a just rate and a fair value assumes that the effort is to insure such a profit as would induce the venture originally and that the public will keep its faith so impliedly given. That, I think, involves a tacit comparison of the profit possible under the rate with profits available elsewhere, i. e., under those competitive enterprises which offer an alternative investment. The implication is that the original adventurer would compare future rates, varying as they would with the going profit, and would find them enough, but no more than enough, to induce him to choose this investment. By insuring such a return it is assumed that the supply of capital will be secured necessary to the public service. As the profits in the supposed alternative investments will themselves vary, so it is assumed to be a condition of the investors' bargain that their profit shall measurably follow the general rates. It is of course not relevant here to discuss these presuppositions, since they have now the support of authoritative law.

Certain risks in ordinary competitive enterprises can be reasonably anticipated and business practice includes them in an amortization account. New processes and machines are constantly appearing which make the old obsolete; ordinary wear and tear makes necessary replacements. The return to make these good is commonly carried in a separate account by all prudent business men and does not come out of the rate. It is true that individual misfortunes cannot be foretold, and these a given company must bear just as any single competitive venture would have to bear them. Among these, however, is not a general rise in prices, which affecting all alike at
least after a time, enables each to raise his price not only be-
131 cause of his costs in labor and in materials, but to obtain a proportionate increase in his profit, based upon the increased value of his plant and machinery. All competing producers who give the same service must keep invested an increased number of

dollars in capital to do so. The risk of the depreciated dollar is not one which industry in general will bear; it is indeed no risk at all.

Moreover, a profit based upon the enhanced value of the capital adds nothing in truth at all to the company's wealth. Though its capital be measured in more dollars and so, too, its profit, that profit is still paid in the fallen dollar and has no greater buying power than it had before. The increased valuation of the capital will for the years of the depreciated dollar leave the company exactly as it was; it will merely prevent its being compelled to share its putative fair profit with its customers, which by hypothesis it should not be asked to do. The company gains nothing, the customers lose nothing.

Indeed all this is so much in the primer of economics that it is inconceivable it should be misapprehended as to working capital for instance, and the contrary view has crept in, I think, only when one thinks of the more permanent kinds of capital, and instinctively assumes that the rate will apply after that capital has resumed its former prices, if it ever does. There is in short a tactic assumption that the valuation must last as long as the permanent capital. There is no warrant for that assumption, because precisely the same reasons which compel the "rate-base" to be raised after a rise in price, compel it to be reduced after a fall. There is a natural enough reluctance to a continuous re-appraisal of plants and property so. It must of course appear that the variation in prices is not transitory, and the period of probation before a company is allowed relief is precisely to insure against that possibility. The chance of loss
132 during that period such companies must endure, and there is an inevitable "lag" in readjustments in each direction. But once it appears that the new price-levels are not transitory it is no answer to the company's complaint to say that at some future time prices may fall. When that time comes, if it does, the property must again be revalued, but meanwhile they are entitled to some protection, and, since these have become questions for the courts, to the protection of the courts.

The rule of the present reproduction cost which is a necessary consequence of the foregoing argument, appears to me to have been either expressly or implicity recognized in all the cases in which the Supreme Court has passed on these matters, Willcox v. Consolidated Gas Co., 212 U. S. 19, 41, Des Moines Gas Co. v. Des Moines, 238 U. S. 153, Knoxville v. Knoxville Water Co., 212 U. S. 1, 10, The Minnesota Rate Cases, 230 U. S. 352, 434, 454, 455, San Diego, etc., Co. v. National City, 174 U. S. 739, 757, San Diego, etc., Co. v. Jasper, 189 U. S. 439, 442, Darnell v. Edwards, 244 U. S. 564, 568. It is true that its application has not distinctly arisen since the recent rise in prices, but it is not possible that it should have general application and yet not cover this, its most glaring illustration.

I am not of course aware that the present cost of a plant, and especially of a putative standard plant, is hard to prove, but that is no answer. It may in fact be the case, usually it is, that the safest basis for estimate is the evidence of what the actual plant cost with its additions, which are not renewals or a cover for renewals. The

mere opinions of experts are a doubtful need,—we need not lean upon them;—but the question of evidence is one, and of what it shall show is another. I am aware also that in the case of railways the principle of reproduction cost presents most baffling problems, perhaps fatal to its application,* but these arise from the fact
133 that the valuation of a substituted service in the case of railways is impossible without already presupposing the existence of a railway, so much do railways affect the whole life of the community. In the case of the land used by a gas company the valuation may theoretically be said to involve a similar begging of the question, for without gas a modern city would be another place. Nevertheless, land and building materials and machinery have a value independent of the existence of this or that or any gas company. No "gas value" is involved as was "railway value" in The Minnesota Rate Cases, supra. All the component elements are purchasable, and the cost of the standard plant can be ascertained with fair accuracy. The single element of the cost of tearing up the streets must, however, on authority be omitted. Des Moines Gas Co. v. Des Moines, supra.

Depreciation.

The defendants insist upon the element of depreciation based upon an allowance each year of that proportion of the total value which a year bears to the whole life of the plant. The Supreme Court (Knoxville Water Co. v. Knoxville, supra, Minnesota Rate Cases, supra), has recognized that some depreciation is a proper element in estimating the "rate-base", but has not as yet authoritatively settled on what principle it shall be calculated. It seems to me hardly possible in the case at bar to avoid taking a position with regard to that principle.

If the proper standard for a "rate-base" is the present cost of a substitute plant of equal capacity, as I believe, depreciation can be a function of it only in case the allowance for renewals to the plant under consideration will in the future be greater that that
134 of the assumed standard. If the rates allowed in the future include only an allowance for renewals of a new plant the company will have to abate something from its normal profits because of its extraordinary renewal charges. Theoretically it makes no difference whether this problem is met by giving the plant a smaller value at present because of its future greater renewal charges and then allowing a higher rate for renewals, or by giving it its present value based on capacity and letting it bear its extra renewals out of its normal profits. Were the plant sold, the future abnormal renewals would be reflected in the sale price, being discounted at once, but that would be because the parties must at present clear their accounts once and for all. The seller would be unwilling at once to abate from his price, and later to allow the buyer

*Gerard C. Henderson, 33 Harv. Law Review, pp. 902, 1031.

from time to time for his unusual renewals. In case of a public service company where the authorities may always require the plant to be kept up to standard, there is an obvious advantage in declining to attempt a repeated adjustment between the actual renewals necessary and normal renewals, as would be necessary if the present prospect of such allowances are now discounted; it is the better practise to allow the plant to bear its owns extra renewals and to insist that it shall always be kept up. Therefore, it appears that, so far as concerns the future, the age of the plant should not be a function in the "rate-base".

On the other hand, in computing the "rate-base" from the original cost, depreciation is of vital consequence. Practical men will prefer to ascertain the cost of a present plant by experience, when they can, rather than by estimate, just as the master here has done. In so arriving at the cost of a present plant of equal capacity, it is clear that the original cost of the plant in question must be abated by depreciation, so far as that is reflected in a loss of capacity. In such a calculation, however, there must figure past renewals
135 as an offset to past depreciation and if in fact the capacity has remained the same, depreciation should not be a function of the "rate-base" at all. In such a case the inquiry as to depreciation should be confined to changes in "price-levels".

Franchises.

If this case were res integra, I should not hesitate to refuse any valuation to the company's franchises. On principle the case is very clear. A franchise is a right to keep mains in the streets and furnish gas to the inhabitants of the city and it is granted upon condition that the rates shall be controlled. If the franchise gets a value because the rates have not been controlled, the "reasonable expectation" of their continuance is without basis, and that is the only possible ground for a vested interest in such rates. The inaction of the authorities in the past gives no prescription, and without such prescription the franchise can have no capital value unless the very point is assumed. That the franchise has a kind of value is of course true enough: it alone protects the "tangibles" from becoming junk; but as a part of the "rate-base" it should never figure. This was all stated in Consolidated Gas Co. v. New York, 157 Fed. R. S. 849, and not denied in the Supreme Court, but each court thought that the incorporation under the State of 1884 constituted a recognition by the State of some capitalizable value to the franchises of the company, and the Supreme Court fixed that at seven million seven hundred and eighty-one thousand dollars, the original sum. That was in 1909, twenty-five years after the company had been organized and when its business had grown very substantially. I own that I am not clear whether or not the Supreme Court meant to declare
136 that this value should exist perpetually as a means of drawing a profit of six per cent or more, but it is clear enough that if it was worth that sum in 1884 and 1909, on any conceivable theory it is worth as much in 1920. Therefore, it appears to me that the

master did all that he could under the circumstances in adding that sum to the rate-base," at least until the Supreme Court shall indicate some contrary rule.

The defendants, however, urge that the franchise rights of the company have changed since 1909. Their contention rests upon circumstances, which are more detailed than it is necessary to set down here, but the substance of which is as follows. The constituent companies, consolidated in 1884, held a number of legislative grants to furnish gas in New York and to lay mains in the streets. These were all substantially similar in this respect, that the consent of the municipality was necessary before the streets could be opened. In the case of each franchise the municipality gave its consent to the opening of the streets for a limited period only, and before 1909 that period had expired in the case of all but three, i. e., the "Anthracite," the "Harlem" and the "Knickerbocker." Of these, the last two affected only such territory as lay north of Seventy-ninth Street in New York, that is, the district last populated. In 1913 the consent to dig up the streets given under the "Anthracite" franchise also expired, so that at the present time the company has no such rights south of Seventy-ninth Street. North of that street it has such rights as the municipal consents under the "Harlem" and "Knickerbocker" franchises still give it. Not only does the "Anthracite" franchise still exist, shorn of the consent to dig up new streets, but the company has several other franchises of the same character, under
137 which consents were originally given to dig up the streets, which had long since expired before 1909 and indeed with one exception before 1884.

Therefore, the change in the company's rights since 1909 comes to this, that it now has no more rights to dig up the streets south of Seventh-ninth Street, which it had until 1913 under the "Anthracite" franchise. Its right, however, to maintain its existing mains and to furnish gas to its customers is not affected by the expiration of that consent, New York v. N. Y. Mut. G. L. Co., 207 N. Y. 647. The change in the value of the franchises turns upon the value of the right which existed in 1909 but exists no longer to lay new mains in the streets below Seventy-ninth Street if the municipal authorities consented? Obviously that question cannot be answered. Not only does this record show that the streets are already so full that no other mains could in any case be laid, but the original right was not absolute, depending as it did upon the exercise of the discretion of the municipal authorities before it could be enjoyed. It seems to me a fanciful conclusion to attribute any value to the right to require by mandamus (Ghee v. Nor. Un. G. Co., 158 N. Y. 510, 525), the exercise of such a discretion in a territory where under the record no intelligent authorities would in any event grant such a right, or could be required to do so. The substance of the right remains and has been expressly so adjudicated in an analogous case. Perhaps the Supreme Court may choose to modify its original ruling upon the whole subject, but it would be a most unreal distinction to base such a modification upon the slight differences which are shown

in this record. I shall therefore accept the valuation as settled in the earlier case and by the master here.

138 Rate of Profit.

Another preliminary question is that of the proper rate of profits. In Willcox v. Con. Gas. Co., 212 U. S. 19, the rate of six per cent was accepted as a proper return. In Denver v. Denver Water Co., 246 U. S. 178, 194, the same rate was implicitly accepted. In Lincoln v. Lincoln Gas etc. Co., 250 U. S. 256 the court indicated that changed conditions of investment might change the rate. Eight per cent was mentioned, though probably not as intended to cover the case of a sure monopoly such as this was described to be in Willcox v. Con. Gas. Co., supra. The evidence in this record indicates that eight per cent is the going rate at the present time and that stands uncontradicted. For many months past the United States, certainly the most solvent debtor in the world, has paid either six or nearly six per cent, and other governments higher. As the facts develop in this case I need not find any rate except to say that less than six per cent would be insufficient. I have made findings based upon both six per cent and seven per cent. If the rate is to correspond with the market, seven per cent would scarcely seem too high, and at least so much appears to have been taken as the standard in Lincoln v. Lincoln Gas Co., supra, the last declaration of the court.

The Admissibility of the Books of Account.

Most of the evidence and testimony in the case at bar necessarily depended upon the records of the plaintiff contained in books of account of all descriptions supported by vouchers, books of original and secondary entry. These were proved only to the extent of showing their general character and that they had been kept in the
139 usual course of the company's business. The same applied also to the Astoria books, that company being treated as though it were an operating unit of the plaintiff. Indeed, these books the defendants themselves offered in evidence.

The defendants objected to the reception of all these books on the ground that they were not properly proved. Probably the proof was inadequate, even under the present-day laxer rules, had they been used in an ordinary case, as, for example, to prove transactions recorded in them on which obligations of a third person depended. The case is not such. This is a suit between the authorities of a State and a company long since recognized as performing a public service and under the regulation of the State. Article Four of the Public Service Commissions Law of New York puts the entire conduct of such companies as the plaintiff minutely within the regulation of the Public Service Commission. Section Sixty-six gives the Commission general supervision over all such, power to investigate the quality of their services and to fix its character, to prescribe the form of the records and books it shall keep, to examine its officers and those records, to keep informed as to its doings and its property, to

require a detailed annual report including its receipts and expenses and any other important facts it may wish, to enter upon its property and examine its books and vouchers, to compel the production of any such, to subpœna its officers, and to compel it to keep its accounts of separate businesses separately. Books kept in accordance with orders lawfully promulgated by the commission under such powers are on a different footing in a suit based upon the action of the State and against its officers, from even the same books if attempted to be used elsewhere. They have a public character derived from the supervision which can be and is exercised over them. The au-
140 thorites are not of course bound by them in any event, but, prepared as they are, under their direct and constant supervision, they can scarcely be put in the category of the usual ex parte entries about whose admission the cases are concerned. The State having had so much hand in their creation and such continuous power of examining them, should not be entitled to demand a verification first-hand of every item by common-law proof, before they become prima facie competent. The guaranty of their truth is sufficiently established by the scrutiny to which they are always subject, and the penalties which follow upon a disregard of the Commission's orders (Section Seventy-three). It would indeed be an incredible burden to require every item to be separately established and even these defendants have not gone so far as that. But if the books are not prima facie competent they might call for such proof, nor can I reject them without putting the company upon their mercy.

Documents prepared in an analogous fashion came before the court in Rowland v. St. Louis, etc., Co., 244 U. S. 106, 108, and Northern Pac. Ry. v. Keyes, 91 Fed. R. 47, 58. In each the court received them, though prepared in disregard of the strict rules of the common-law, because of the opportunity afforded the authorities to check their accuracy by a recourse to the original records and if necessary to the entrants who actually made them. In neither case did it appear that the company was under such stringent supervision as has been established in New York. Here, as in Rowland v. St. Louis, etc., Co., supra, it may be said that the company "exhibited its worksheets and data to the (defendants), that the returns were made by the employees in the course of their business, and that if the (defend-
ants) had desired to question any of the data they could have
141 called for further verification."

Nor, indeed, were these books admitted until Teele had made a thorough checking of all the items by their vouchers for the period of a month or more, submitting them in this way to an honest test of their accuracy. The "purely negative attitude" of the defendants is not consonant with that desire "not to seek an unjust advantage from the difficulties of stating the company's case," which we are told must be imputed to a State in such affairs, Rowland v. St. Louis, etc., Co., supra.

I do not forget that in some respects altogether inconsequential so far as I can see, the books did not strictly conform with the orders of the Commission. These variations were in good faith and threw no doubt upon their veracity. They could have been easily corrected,

had the Public Service Commission thought it necessary to correct them.

The Plaintiff's Failure to Supply Candle Power.

At the outset of the case the defendants insist that the plaintiff may not get equitable relief because of its violation of the statute requiring it to furnish gas of twenty-two candle power. While the requirement seems to be accepted by all competent persons as unnecessary and wasteful, it must of course be regarded as a duty imposed upon the plaintiff while it remains upon the statute book. A persistent and deliberate disregard of it might, I should think, bring this case within that somewhat indefinite rule which turns out of a court of equity a suitor who has himself been unjust in the very matter of which he complains. The situation here is short of that. In the first place, there is some question whether the readings made by the city employees charged with the duty are to be taken as
142 against those of the plaintiff itself; indeed on that subject the master has found against the defendants. Apparently the tests are not absolute and men may honestly differ as to their results, but I have not felt it necessary either to examine the method or to determine the issue upon the evidence for the following reasons.

The defendants prove many violations under their own tests which were taken ten times on substantially every day during the years 1916, 1917, 1918 and 1919, the master declining to go further back, and rightly, in my judgment. The importance of the failure to come up to the standard best appears from the averages. In 1916 and 1919 the average of all ten monthly averages was never below twenty-two for any month; in 1917 the month of November averaged (taking all ten) 21.80 and in December, 21.99. It thus appears that through all this time the city's own charts show that the average for each month was up to standard unless one per cent. is to count. The year 1918 was indeed quite different. From May first to November first the United States had commandeered the oil in two of the plants for making toluol and the standard collapsed, falling in October to 14.92 (average of all ten observations). For the other months of 1918 the averages are as follows: January 20.61, February 20.52, March 21.63, April 21.51, December 20.98. These are the only months which need count, and the default amounted to 6.3%, 7%, 2%, 6.3% and 5% respectively.

But I think that the defendants are in no position to take these figures against the company anyway, because of the conduct of the business between them. The company also made its own tests and sent the results daily to the City, which retained them and took no action. Except for January and February, 1918, and the period of the commandeer, the company showed averages equal to the
143 standard. Their average for January was 21.36 and for February 21.27, about three per cent off. Now it must have appeared to the company and may well have been the case, that the acquiescence in these tests indicated either that the City was not confident of the superiority of its own tests, or that they meant to make no complaint of such slight variations. The standard is not useful

anyway, and it was to everyone's interest not to have the company use more oil than was absolutely necessary, for oil is extremely expensive. In any case it comes now with the illest grace to raise such a plea to defeat a suit so vital to the company, after such acquiescence. The issue of the correctness of the company's tests was certainly waived and the whole defense boils down to the deficiencies in the months of January and February, 1918, as to which, de minimis non curat lex. It is not quite true to say that the whole thing does come down to that, because the defendants do even assert that the company should be charged with the defaults during the commandeer. More hardly seems necessary than to allude to such a sorry plea in a court of equity.

Gas Unaccounted For.

Into all the calculations there must come the loss of gas occasioned by condensation, leakage and perhaps other causes. It becomes necessary to know by how much the plaintiff's production must be taken to be larger than the sales passing through the customers' meters. While it is quite possible to tell this with accuracy for the whole system of which the plaintiff is a part, it is impossible to do so for the plaintiff separately, owing to the interchangeable connections of the mains. The loss of the system as a whole has been reported yearly to the Public Service Commission, and represents the difference between the gas made and the sum of gas recorded by
144 customers' and company's consuming meters. The years 1917 and 1918 were abnormally cold and showed an unusual loss of this kind. Obviously they are not a fair specimen of the normal loss occurring from these causes. The average for the whole system over the period of thirteen years during which the statistics were given to the authorities was 5.31% and unless there are some disturbing factors this is a valid starting point, which the company must accept. The only disturbing features suggested here are the poorer quality of coal and oil and I take against the plaintiff any doubt which those factors may raise. I accept the average of 5.31 as a proper allowance for the system as a whole, at least in a rate case.

The allowance to the company is certainly less than this figure, but how much must remain in doubt. The estimated average as reported by the plaintiff to the Public Service Commission for the years 1906-1918 inclusive was 4.09, and there is a strong presumption that this is correct. Nearly the same result may be reached by another method. It appears to be accepted that three per cent. is the proper allowance for all waste but main leakage, which varies inversely with the density of the customers per main mile. Now taken grossly the company has about double the density per main mile of the other companies. We may then apportion the sum of 2.31% for main leakage correctly by dividing the main mileage of the company in half and using the resulting sum for the total mileage. Assuming the total output to be thirty-three billions, of which the company will furnish twenty billions, the systems' loss from

main leakage is 762.3 millions, of which the loss attributable to the company is twenty-eight per cent. or over two hundred and twenty-three millions. This is about 1.12% which with three per
145 cent. equals 4.12% of the gas made, which is surprisingly close to the average reported by the company itself. I shall therefore take 4.1% as the proper figure for gas unaccounted for.

Price Paid by the Company for Oil.

Oil is the principal ingredient in the manufacture of water-gas and has of late been rising sharply in price. As it figures so largely the defendants have made a strong attack upon the contracts made and the prices paid by the plaintiff and this had best be decided before the account is stated. The company has always bought its oil from the Standard Oil Company of New Jersey, which has a common director with itself, who is on the plaintiff's executive committee to which were referred all oil contracts. It may be assumed that there is also some common stock ownership. The position, at least of the learned Corporation Counsel, is that, owing to this community of interest, the company has favored the Standard Oil Company of New Jersey in its contracts, necessarily throwing upon the stockholders of the company a heavy loss, unless it can in turn impose it upon the public. As this charge is equivalent to a fraud in the conduct of the company by its directors, it deserves scrutiny.

Between November first, 1905, and December, 1919, the company made in all nine contracts for the purchase of oil, not only on its own behalf, but for its constituent companies, all of whose needs it supplied. The result was that it was a very large purchaser of oil, making contracts for over a hundred millions of gallons at a time. There is no reason to question the propriety of its course, provided it bought honestly and with proper care to get as good a price as possible. There were in New York a number of independent small companies buying oil at the same time and the best evidence,
146 as it appears to me, of the proper price to be paid can be gathered from the prices at which they bought. Other contracts were put in evidence, made in New Jersey, Philadelphia, and one in Boston, and these too are relevant, especially those in New Jersey. In New York during the fourteen years in question, in all seventy-seven contracts were made besides those of the plaintiff. These were all for much smaller quantities and it might naturally be expected that they should be at higher rates, but this is not necessarily true, because the substance is a by-product of not unlimited supply and it has lately come into other uses which have increased the demand. It seems doubtful whether a large contract commanding a substantial part of the supply for a period of one year or more, must be at lower prices than a small one. That is the one conceivable reason for questioning the prices obtained by the company, and it appears to me an insuficient one especially in the light of the very large Philadelphia and New Jersey contracts. A comparison may be made of each contract of the company by taking the average

of all others in New York made within six months, on either side of that taken, and the following table is so computed, except in the case of the last two contracts, which were at too short intervals to permit that course, the second being a modification of the first.

	Company's rate	Average rate of other N. Y. companies	
Nov. 1, 1905	1.29	3.062	(2 contracts.)
Jan. 5, 1909	3.	2.78	(6 contracts.)
Jan. 1, 1911	3	2.742	(3 contracts.)
July 1, 1913	3.035	3.462	(5 contracts.)
July 1, 1914	3.035	3.62	(9 contracts.)
Nov. 13, 1916	5	4.8	(6 contracts.)
Dec. 4, 1917	6.5515	6.785	(6 contracts.)
Dec. 18, 1918	7.5721	7.528	(6 contracts—November and December, 1918.)
March 28, 1919	6.0824	5.904	(3 contracts, two in March at 6.081 and one in June at 5.75.)

147 It is of course plain that this table may be misleading, because the price varied much within a year. It may be corrected by a comparison within a month on either side of the contracts without change of result. This shows that at least for the last seven years the company always bought at about the going rate. It is clear beyond peradventure that, based upon New York prices, the charge is utterly baseless that the company was paying more than the market, so far as there may be said to have been a market.

Nor was the New Jersey price substantially different from the New York price. This price is evidenced by four contracts between the Gulf Refining Company and the Public Service Gas Company of New Jersey, for very large amounts. The first of these was on June first, 1910, and the prices varied between 2.18 and 2.82 according to place of delivery. At that time the prevailing price in New York was about 2.45, the company making no contract for seven months thereafter by which time the New York price had risen. The next was on May twenty-fifth, 1913, between four and a half and five cents. The New York price ranged from five to a fraction more. The next was on August fifth, 1914, at prices between 3.05 and 3.55, the New York price being between three and a quarter and three and a half. The last was on June twenty-first, 1919, at prices between five and 5.85, when the New York price was from 5.75 to 6.08.

The Philadelphia contracts were five in number. The first was September thirtieth, 1912, at 3.95. In September of that year the New York price was 4.18, in November 4.5 and in December, 3.1875. The second was on October twenty-first, 1913, for 4.45; the nearest prices in New York were January, 1914, 4.25, and July first, 5.035. The third was on August fifth, 1914, at 3.05, and the fourth

148 on September twenty-fourth, 1914, at three. The New York price on June first (company's) was 3.035, and on September

tenth, 3.5. The last two contracts were on September twenty-third, 1919, and October twenty-first, 1919, at five. The nearest New York prices were June twenty-fourth, 5.75, and December between 7.05 and 7.55. Of these five the last alone shows any marked divergence, accounted for by a very sharp rise in the last month of 1919. While the Philadelphia prices are on the whole lower than New York, there is no divergence, which may not be accounted for by differences in transportation.

The single Boston contract was on September twenty-ninth, 1916, for 3.625 to 3.995. At that time the New York price was four and three-quarters to five, about a cent more. This alone of all the contracts offered appears to show a very substantial divergence, which is not accounted for.

The upshot of it all is that unless all the other New York companies were paying too much for oil the plaintiff was not; and that as compared with the eastern towns of New Jersey and Philadelphia, New York was not on the whole paying enough more to justify any inference. The charge of a sinister connection between the company and the Standard Oil Company of New Jersey appears therefore to be without the slightest evidence. The proper price for oil in calculating the future cost of production is hard to fix. At the end of 1919 in New York as based upon three contracts made in December it was about seven and a quarter cents. The master has accepted a price of 6.9 plus lighterage as of the date of his report. He has allowed in his calculations as of the first eight months of 1919, 6.8, that being the actual price paid by the company. I have no doubt
that this was an honest price made in a genuine effort to do
149 the best possible and it is certainly less than could have been
got later in that year; it is a most conservative figure for reckoning costs for the future, so far as can now be seen, and I accept it.

Substitution of the Coke-oven System.

The defendants urged that in view of the increased price of oil a proper distribution between coal-gas and water-gas would not be twenty-two per cent to seventy-eight per cent, the actual practise, but half and half, and that in producing coal-gas another system should be adopted known as the "coke-oven" system, advocated by Mr. Little, their expert, who made an elaborate calculation of the cost under that method. This involved a new plant, and it cannot be successfully maintained that the plaintiff is now obliged to erect one at the cost of eight million dollars. Indeed, the defendants do not say so, but that they should have built such a plant long since, during the era of low prices. It is not, however, in my opinion necessary to consider whether the plaintiff should build or should have built such a plant. The cost of production of such gas might still be a proper test of the production costs with which they should be credited, even though they cannot meet it. In short, their plants and methods might become obsolete through progress in the arts, and, if so, on a competitive basis they would have to bear the consequent loss. It would be a risk which is inherent in the industry

and one which so far as it is covered at all must be covered in the general allowance for replacements, or in the generally higher rates of profit which the industry should carry.

It becomes necessary, therefore, to consider the possibility of using the coke-oven system at the present time in New York. In the first place it must be remembered that the purchase of such gas
150 from others is out of the question. Some suggestion was made that this could be bought from the Seaboard By-Products Company of New Jersey, but that is too extreme to deserve any comment. Leaving out those companies who purchase "coke-oven" gas, there are few who use it, about twelve in all, most of them in the Mississippi Valley, out of a total of a thousand companies in the United States. Therefore, I should doubt very much the propriety of using it as a test of normal cost even where the conditions made it apparently feasible.

Ignoring this, however, the conditions are not feasible in New York. Little made his cost $.199. In so doing he gave an enrichment cost of $0.553, on an assumed candle power of sixteen. Mr Little's figure for enriching the House A coal-gas, which he assumes to be sixteen candle-power, was $.0678, and was in fact, as Sangster's report shows, $.1155. I think he has got his enrichment cost much too low. It is fair to assume that his error in the figures for House A, both in candle-power and cost enter here and if so, that cost must be raised $.06, making a total cost of $.259.

Little's whole theory presupposes that a part of the residual coke should be sold at a price of seven dollars a short ton, and that the remainder should be credited at six dollars upon the company's water gas production cost. He knew nothing whatever about the price at which coke could be sold in New York except what was told him and his information was erroneous. In 1919 the Seaboard Company was selling it continuously to the plaintiff at six dollars and fifty-five cents a long ton, delivered alongside, and the cost of delivery was certainly fifty cents and perhaps sixty-five cents. The price to the Seaboard Company was not more than six dollars and five cents to five dollars and ninty cents per long ton, or five dollars and forty
cents to five dollars and twenty-seven cents per short ton.
151 Little figured one hundred and seventy-two thousand four hundred and ninety-nine tons at six dollars, and four hundred and eighty-five thousand three hundred and nineteen tons at seven dollars, and his error is $.128 or $.146 (he appears to have been mistaken in admitting that the difference was seventeen and a half cents.) His price would become in the neighborhood of forty cents, i. e., within one and a half cents of the coal-gas price. Considering that his labor cost is only about one-half that of House A, and that his assumed coal price of five dollars and twenty-eight cents does not agree with Sangster's figures even when reduced to short tons, it is quite apparent that his conclusion of twenty cents for coke-oven coal may not be taken as a basis for a substitute price. Furthermore, here as elsewhere he assumes an output of eighty-two and a half per cent of total capacity in a year, which is greater than the actual output even for the three winter months.

Mr. Doane had been for many years concerned with the coke market in New York and its environs and up to 1915, had made more or less continued efforts to obtain a market for so much as the company did not use. After that time it became cheaper to use than to sell it, but his judgment based upon his experience is that it would be impossible to sell such large quantities as would be produced by the coke-oven process. As a fuel it has great advantages, but the people are not used to it and it requires different handling from anthracite coal for which it is a substitute. In Doane's efforts he found this an effective barrier to its introduction. My conclusion is that while the testimony is, as the master says, impressive, it would be unfair to assume that the coke-oven system will be more economical, and that it is too uncertain anyway to justify taking its cost of production as a standard here; its results are too indeterminate. As to the so-called "chamber-oven" system, it is too experimental yet to be taken as a substitute cost.

152 The other question is of the proper proportion of coal-gas to water-gas production. While the constituent oil of water-gas remained a by-product for which the demand was slack, there were great economies in its manufacture. Not only did it take very much less coal, but the plant was decidedly cheaper and there was no problem in disposing of the residual coke. With the discovery of new uses for this oil, itself a residual, and the ability to extract gasoline from it, the price has greatly risen and it is a doubtful question how long it can continue to be used. While the statute imposes a twenty-two candle power standard both sides agree that a certain amount of water-gas is a necessity for the coal-gas must be enriched and this requires oil. Mr. Little gave the proportion of half and half as ideal, where such a standard obtained, though the practice of the plaintiff has been about twenty-two per cent to seventy-eight per cent. He said, however, that he was not aware of any such plant, and in December, 1919, when it was decided to add to the Astoria plant a water-gas unit was selected. This was after this case had progressed for many months and the plaintiff knew that its practice was under criticism. It was moreover in the face of a sharply rising cost of oil. Ignoring the supposititious desire to play into the hands of the Standard Oil Company, which seems to me wholly apocryphal for the reasons I have given, I can see no motive for it but an honest belief that weighing all considerations the chances still favored water gas manufacture.

Not only is the fixed capital item a factor, but the cost of coal is advancing with that of oil. Furthermore, it has been extremely difficult to get a proper supply of coal at all, and that difficulty still remains. It is due to transportation troubles, which we all hope will be solved in the near future, but solved they are not yet
153 and they must continue for a season to enter into the forecasts of a manufacturer who at any cost must be assured of a regular and sufficient supply of his raw materials. No one can of course prophecy what relation the costs of coal and oil will be in the future and for the present I see no reason to revise the judgment of the

plaintiff's officials in choosing this plant. As in other cases where the matter rests in their discretion, I think that a presumption exists that it is well exercised until the contrary is shown. I have therefore made all calculations on the present proportion of production, though the alternative of half and half is set forth alongside. It makes no difference in the final result.

Cost of Production in 1918 and 1919.

Having disposed of these preliminary questions, it becomes possible to consider the cost to the plaintiff of making gas so as to compare it with the rate. That cost is made up of four items; the cost of production in the gas-house, the cost of distribution, taxes, and storage and replacements. The difference between the sum of these and the income is profits and should be compared with a fair return upon the capital invested. I shall start with the cost of manufacture in the plant.

The master accepted for a standard the cost of manufacture, taken from the books of the Astoria Company, for the first eight months of 1919. This is a plant over ten years old, but it may, I think, be safely taken as a proper standard. Certainly Mr. Little thought that for coal gas, House A., and for water gas, House C., were suitable. He thought House B. not economical because of the absence of certain labor-saving devices, though the item for labor was greater for House A. in his estimates, but of House A. he made no complaint.

154 I shall therefore take the analysis of the costs at House A. for coal-gas and House C. for water-gas as taken from the Astoria books for the full year 1918 and for the first eight months of 1919. Sangster, the defendants' accountant, was given full opportunity to examine these and to check their accuracy and his tables I use. His results must be accepted as true and valid, except in so far as any of the practise in that house can successfully be criticized. I know of no such possible criticism unless it be the amounts of materials used and the extent to which the houses were driven. The second point comes up for consideration later and upon the first I shall say but little. The amount of coal and oil necessarily vary with the quality of each. Everyone agrees that the quality of coal has fallen off in recent years; it is urged that at Astoria the amount of coal is inordinate. Now Mr. Wood's estimate of bituminous coal for coal-gas was indeed only two hundred pounds and that was ample before 1916, but in 1918 House A. in Astoria used by Sangster's tables 207.6 pounds, and in 1919 nearly 211.5. These figures seem too large and would have been so in the earlier years, but Mr. Little himself thought Wood's estimate too low at the present time and insisted that two hundred and seven pounds was necessary, substantially the Astoria practise in 1918, and near enough to that of 1919 not to justify suspicion.*

*The correction would be so little that I think it not worth while making, certainly in 1918, the only year when the profits are at all near the rate.

The bench and boiler fuel accounts in either year was a very small proportion of the cost of materials and any saving if
155 saving there should have been would hardly figure appreciably.

As respects water-gas the necessary amount of oil to be used is not in much dispute, at least so I understand it. It is true that the average in the Manhattan plants has gone up from 3.80 gallons in 1913 to 4.1 in 1919, but that is less than eight per cent. increase, easily accounted for by a change in quality. It is noteworthy that in 1915, long before this suit was in contemplation, the quantity used in the Manhattan plants was 4.06, substantially what it is now at Astoria.

As respects generator fuel for water-gas, Sangster gives for House C. 35.3 pounds in 1918 and 36.43 in 1919. These are higher than either Woods's estimates or the practise on Manhattan but by less than nine per cent. in 1918. The item is only ten cents in that year and if Manhattan results were accepted it would make a difference of .9 cent in the price. Whether Astoria got worse coal or what was the reason I do not know. I have corrected the water-gas price by .9 of a cent for each year to allow for this, which seems to me the only correction necessary on any of the items.

Taking, then, House A. as such a standard and accepting Sangster's analysis of its actual expenses, we may start with a total cost of production at the plant meter for coal-gas of $.4155. Sangster's figure for water-gas at House C. is $.44746, which I take at $.43846. Taking the average of $.4155 and $.43846 on the basis of twenty-two per cent. for coal gas and seventy-eight per cent. for water gas, the final figure is $.4334. If the proper proportion between coal and water gas be half and half, this figure would be $.4270. Allowing a loss of gas on the average of 4.1% the cost in the consumer's meter is for these two figures respectively, $.4519 and $.4452.

Little's figure for ideal coal-gas production at House A.
156 in 1919 is $.28 and for water-gas at House C., $.396. The difference is in part taken up in the cost of materials, and in the number of employees, his estimate of labor being prepared upon hypothetical standards of what a proper plant should require. As to the cost of materials, the chief difference is the price of oil. Thus, the difference for oil alone is $.03149, making the cost of water gas $.4275 if so corrected, as against $.43846. The apparent difference is much more marked in the coal-gas made in House A., but most of it is in oil, repairs and the like. For example, there is a difference of $.477 in the cost on enrichment alone which certainly should be taken on the basis of the actual amounts paid for oil and the necessary amounts used. Again for electric power, superintendence and repairs, he allows only $.0255 in all, (as I figure the several items), as against actual expenses of $.08309, a difference of $.0576.

Thus coke, a residual, varies with the coal used, at least so Sangster says in his report. The difference between the coal cost and the coke returns for House A. in 1918 was $.05648. If I take 200 lbs. for that year the credit would be 96.8% of that or $.05456, a difference of $.00192. 22% of this with correction for waste is only $.00046 for the difference in joint cost. The similar figure for 1919 is $.00183.

Thus with only these corrections, which are inevitably proper from any aspect, his ideal coal-gas cost for 1919 becom s $.3853 and his water-gas $.4275. Taking these figures in the two proportions mentioned and making allowance for 4.1% loss, his figures would be respectively, $.4358 and $.4238. These differ from the figures for 1919 by $.0161 and $.0214.

Some part of this is probably accounted for by the fact that in Little's figures he considered House A. as running at one hundred per cent. per day for three hundred and ten days and House C. at one hundred and ten per cent. capacity for three hundred and sixty-five days. If this was erroneous the fixed charges on each house were divided by too high a figure, and the result was too small per thousand cubic feet. I have already noticed a difference in the case of some of these items, but it will obtain in all those whose gross amount unlike materials, does not vary directly with production.

157 Among these labor is one, at least in House A., with inclined retorts, since the same crew will make a varying output at the same wages. This, Wood says, is not so in House B. It is quite clear that the supposed optimum of Little is far beyond any practical possibility and should not be taken as a standard. All the plants necessary for the daily "peaks" with reserve must be kept up all the time with some part of their complement, and it is not fair when seeking a standard not to credit any particular plant with so much idle time as all the company's plants must collectively bear. Under the heading, "Present Capacity and Reserve" I have considered this matter, and show that it is impossible to say that the company has too much capacity. It is, of course, always possible to show that a given plant was worked less than the average, e. g., the Fourteenth Street and Forty-second Street plants, and that its costs should not therefore be accepted as a guide, but that is not the case with either House A. or House C. In 1918 the company's total production, leaving out Fourteenth Street and Forty-Second Street and gas bought, was 17,599,323 thousand cubic feet. Its daily rated capacity was 84,000 thousand cubic feet, a total for three hundred and sixty-five days of 30,660,000 thousand cubic feet. The production was fifty-seven per cent. plus of rated capacity. During that year the production of House A. was fifty-two per cent. minus of capacity and of House C. sixty-one per cent. minus. For the eight months of 1919 the total was fifty-eight per cent. plus*, for House A. seventy-six per cent. plus and for House C. fifty-eight per cent. minus. Thus it appears that taking both years together these houses were kept at about normal production.

158 I think it would be impossible to say whether this would account for the whole difference between Little's figures, corrected for materials, and the actual results at House A. and House C. That would require accurate knowledge of what is the difference of complement between full and part capacity production. However, it is clear that there would be some difference and that in any case Little's figures necessarily based upon purely hypothetical con-

*Without deducting Fourteenth Street and Forty-second Street, which I do not find but which is too small to change the result.

ditions may not fairly be taken against the actual practice which come so near to them in results.

If I take Sangster's figures for 1918 I find the cost of coal gas at House A. was $.31537. The cost of water-gas at House C., $.39843. Taking the proportions at twenty-two per cent. to seventy-eight per cent., and half and half, and allowing 4.1% for loss, I get $.3964, or $.3723 respectively for these figures.

Distribution Expenses.

These expenses are made up from the books of the company, which I have already held to be good prima facie proof. Various items are challenged which must be taken up seriatim:

a.) Repairs to Meters and Appliances.—These are not done directly by the company but by the Standard Company, a subsidiary whose stock is owned by the plaintiff. They are billed to the plaintiff and all items are scrutinized and checked by one of its officials. Presumably the charges include a profit based upon the assumption that the companies are independent, for so the accounts read. In the case of mains and services the plaintiff does the work for the other companies and charged a profit of five per cent. I have not been able to find what the Standard's profit is on this work, but it is scarcely necessary in the case of so small an item. If I
159 assume that the profit was ten per cent, as it is on the sales of gas between companies, there would result a deduction of Twenty-nine thousand three hundred and twenty-two dollars for 1918 and twenty-four thousand one hundred and twenty dollars for 1919. I shall so take it.

b.) Repairs to Mains and Services.—These were done by the company for itself and all other companies. No profits are included and the item should be taken as it reads.

c.) "Promotion Expense for Gas Appliances.

d.) And for Gas Utilization."—These items include the cost of maintaining these departments which the company organized some years ago to push the sale of gas and of machines to burn gas. Their propriety is challenged largely because the sales have not increased much. The truth appears to be that the constantly increasing use of electricity for illumination has driven out gas more and more until to hold its sales the plaintiff must promote the use of gas for heating and cooking. It has succeeded in a slight increase of sales and its officers attribute their ability to do even so well to these departments. I have no doubt that they are right, but whether right or wrong, their decision is not now open to question. They were under a duty to keep up their sales so far as they could, and to push the use of gas in any new ways which the public would use it. Even under municipal management advertisement, when not pushed to the useless extreme which competition too often engenders, is a necessary function. In its proper sense it means

not the creation of a factitious demand by the familiar processes of repeated suggestion, but genuine information in such form as to reach the public.

(e.) Salaries and (f.) Supplies at General Office.—The salaries of the general officers should be apportioned as the master recog-
160 nized and the defendants claim, but it is very hard to find any satisfactory theory on which to allocate them. Obviously it is impossible to learn what part of his time each officer gave to gas or "non-gas" business. The method suggested of dividing in accordance with the income has few advantages except that it is an intelligible theory and has at least some relation to the facts. I shall adopt it, but only because I am taking all doubts against the plaintiff. The same applies to the Transfer, Accounting and Cashier's Departments. In the Engineering, Commercial, Purchasing and Chemical departments there can be no ground for any allocation at all. All this work presumably went for gas manufacture, and so much of it as was expended for other companies appears to have been charged against them in the books. Mr. Woods did not apparently keep exact track of his time but the portion of his salary to be allocated is very trifling. I shall accept those items.

The rest of the charge it is hopeless to attempt exactly to apportion. I shall assume that it was shared between all the foregoing departments in the proportion of their salary accounts, and I shall deduct one-third of that part attributable to the General Offices, Transfer, Accounting and Cashier's departments. The result of this, as I make it, is Seventy-seven thousand one hundred and twenty-two dollars for 1918 and Fifty-three thousand eight hundred and thirty-seven dollars for 1919.

(*i.*) General Office Supplies and Expenses.—I apportion these, very roughly it is true, by deducting that percentage of the whole which the deduction from the preceding item bears to the whole item; that is, I deduct Twenty-three thousand five hundred and nine dollars for 1918 and fifteen thousand three hundred and sixty-one dollars for 1919.

(*g.*) Charges to United States for Officers' Services.—This item does not appear on Exhibits 364 and 365, from which I
161 calculate the cost of distribution. I need not consider it.

(*h.*) Legal Expenses.—I think these should follow general officers' salaries. I deduct fourteen thousand one hundred and eighty-three dollars for 1918 and thirteen thousand three hundred dollars for 1919.

(*i.*) Insurance.—The insurance item covers not only some property not used in the gas business, but the Fourteenth Street and Forty-second Street plants, which, as will appear, I am eliminating from the "rate-base." These items should come out and the means of adjusting the item on that basis has not been pointed out. The defendants claim a deduction based upon the income which has been earned by the insurance funds and upon the insurance participation certificates. These certificates are issued to the plaintiff merely as

evidence of the surplus in any year of the premiums over losses. It does not appear that subsequent premiums may be paid by their redelivery, but possibly this is true.

In view of the fact that the insurance premiums include property not used for gas purposes, I think I should accept the defendants' demand on this item, Seventeen thousand one hundred and forty-eight dollars for 1918, Seventeen thousand four hundred and eighty-one dollars for 1919.

j.) Mutual Aid Society; (*k.*) Superannuation.—Under these two items are charged those payments, now very common among large corporations, by which the employees receive insurance for sickness or distress or a pension when aged. There can be no question of their propriety in substance, nor can I, with deference, agree with Kings Co. Lighting Co. v. Lewis, 110 Misc. 204, 230, that the charges may not be made during the years when the disability existed. The method to be adopted is fairly open to the discre-
162 tion of the officers and in the end it makes very little difference how it is distributed among consumers. The question is whether it is in fact paid and represents a reasonable amount.

In the latter question the master peremptorily shut off any inquiry in the case of superannuation. He assumed that the discretion of the officers was not subject to review, and in this he was in error, because if that discretion had been wanton or extravagant beyond reason it could not stand. However, all the details were contained in certain bundles of papers which the defendants themselves put in evidence and which showed what each allowance had been and to whom made,—at least so I understand, though the exhibits have not been submitted here. I cannot see that the cross-examination which the master stopped could have added anything of substance. The officers examined would scarcely have admitted that they considered the allowances too great, and the only available proof would have been by showing that in other companies such allowances were so much smaller than those actually allowed as to make them extravagant. This the defendants did not offer to show and no doubt could not. I do not think, therefore, that the master's erroneous ruling should throw out this item.

l.) Automobiles.—The plaintiff uses twenty passenger cars in its business, of which seven are detailed for the use of its officers. The point was raised that this number was too many and the superintendent in charge of the department was called by the defendants apparently to establish the point. The resulting examination really goes very little into that issue and was directed for the most part to the method in which the accounts were kept. The master allowed very few questions upon that, and of this the defendants
complain. I cannot see that the examination shut off was
163 of any consequence upon the relevant issue; at least the defendants stated no reason to the master justifying his so supposing.

As to the necessity of having seven cars, I will rule here as elsewhere, in the absence of some evidence showing that they were

unnecessary, or that the officers abused their powers by using them for personal purposes, that their judgment must stand prima facie. As in analogous situations, given the discretion, its exercise must be shown to have been injudicious. I allow the item.

m.) Interest on Consumers' Deposits.—In whatever way figured, it seems clear that this is in no sense a proper item in the cost of distributing gas to the consumer. I am not trying to learn what were the revenues of the company in the past, but to establish a basis for the cost of distribution in the period to be covered by a decree. I disallow this item, Forty thousand nine hundred and five dollars for 1918, Thirty-three thousand six hundred and one dollars for 1919.

n.) Defensive Emergency Service.—This was certainly an exceptional expense caused by the troubled period of the war. It offers no just basis of interference for the costs of distribution in the future. I disallow the item, One hundred thousand two hundred and fifty-one dollars for 1918, Eleven thousand six hundred and fifty-four dollars for 1919.

o.) Miscellaneous General Expenses.—Under this heading the defendants challenge a number of items, which are too many and too small to deserve much notice. All of them are proper enough on their face except the general item of "Miscellaneous Expenses", twenty-seven thousand two hundred and eighty dollars for 1918 and Eight thousand six hundred and fifty-four dollars for 1919. In
1918 about nine thousand dollars seems to have been con-
164 nected with emergency defense. I will deduct ten thousand dollars in 1918 and in 1919 Forty-five hundred dollars, two-thirds of what apparently represented Kenney's Emergency Defense services in 1919.

In 1919 there is an item of Forty-six thousnd three hundred and twenty dollars which comprises the expenses of this litigation. It can hardly be considered a normal charge for each year, and should be spread. I may assume one such suit in ten years. As we have two years to consider I will deduct Forty-one thousand six hundred and eighty-eight dollars from 1919 and add Four thousand six hundred and thirty-two to 1918.

The sum of these deductions is as follows: For 1918, Three hundred and seventeen thousand eight hundred and eight dollars, and for 1919, Two hundred and fifteen thousand five hundred and forty-two dollars. The total costs of distribution for 1918 were therefore Three million two hundred and forty-nine thousand three hundred and thirty-seven dollars, and for the first eight months of 1919 Two million three hundred and seventy thousand three hundred and nine dollars. The rate per thousand cubic feet for 1918 was $.1802 and for 1919, $.1934. A question arises as to this item whether the spread should be taken at the actual production during the years in question or at the supposed production in the future, say twenty billions. A few of the constituent factors, like repairs to mains, would seem to be pretty certainly constant whatever the production.

The greater part of them, however, will vary generally with the amount of business done and in view of the severe treatment which I have given to many of them it seems to me only fair to take the spread at the actual output. There can be little doubt that at any prices now in sight the sum allowed is inadequate.

165 *p.*) Maintenance of Conduits from Astoria.—Connected with the subject of distribution costs is the expense of keeping up the conduits from Astoria.

There are two tunnels running between Long Island and New York, one called the "Astoria Tunnel", from the Astoria plant to the Bronx, which cost $5,178,614.58; the other further south and from the New Amsterdam Company's plant to Manhattan, and called the "Ravenswood Tunnel". These are each used to conduct gas from the Astoria plant to the plaintiff's mains, the plaintiff being the sole consumer of Astoria gas. The lower or Ravenswood tunnel is used to convey coal gas which has been enriched by oil at Ravenswood; it is small and cost seven hundred thousand dollars. However, to reach it the gas must pass through mains on Long Island valued at $844,422.71. All these conduits are formally owned by the East River Gas Company and are used by others than the Astoria Company. The several corporations have adopted a figure of fifty-seven plus per cent. as representing the plaintiff's proper share of these conduits based upon their relative requirements. They have also adopted somewhat arbitrarily the figure of three and a half per cent. as proper for the renewals and repairs necessary for upkeep, the figure being taken from calculations made by the company's engineers by an average over a number of years. There was no apparent motive in fixing it at that amount, except a desire for an honest apportionment of charges between them, even though it were for bookkeeping purposes. Had the defendants wished to meet this proof the actual vouchers were available for them to do so. The estimate under the circumstances seems enough to make a prima facie case, but against any possibility of error I will take it at only two per cent.

166 However, it appears to me a closer estimate not to take the full valuation of the Astoria Tunnel and leave out the Ravenswood and the connecting lines. It is better to treat the whole system of conduits between Astoria and New York as one and to take a percentage of the whole. Past experience indicates fifty-seven per cent. plus, but I shall give my reasons in considering the "rate-base" for taking it higher and allowing Four million four hundred thousand dollars as the proper allocation. At two per cent. the repairs figure Eighty-eight thousand dollars, which on a spread of twenty billions, which it is proper to take on this item, is $.0044. With the other distribution cost the total is $.1846 for 1918 and $.1978 for 1919.

Taxes.

The company has calculated its own taxes and both sides start with that calculation as a basis (Exhibits 205 and 355).

a.) Gross Earnings Tax.—The first item, New York State Gross Earnings Tax, is apportioned in accordance with the division of income between gas and "non-gas" business. This is fair and I do not understand it to be challenged.

b.) New York Special Franchise Tax.—The next item is the Special Franchise tax. This is a tax based upon the value of the property in the streets together with the right to use the same as a public utility. It is of course plain that if franchises proper are not to figure in the "rate-base", so much of this tax as is figured on franchise as against the value of the mains and the like is improperly levied. The State should not at once levy taxes on the basis of a supposed value in the franchise and refuse to recognize that value as property on which any income may be earned. But at
167 least while the State continues to do so, it must be content to allow the sums paid to be a credit in the account.

The only question, therefore, is of the proper allowance for the franchise tax. In 1918 these were assessed at Three hundred and eighty-four thousand two hundred and ninety-seven dollars, and in 1919, One hundred and ninety thousand six hundred and fifty-eight dollars. There would be no difficulty in allowing these sums were it not that the assessments have always resulted in contests in which the company has never but once paid the full assessment. It therefore becomes necessary to conjecture what the proper credit should be, and obviously the only basis is past experience. Between 1906 and 1914 exclusive settlements have been made on the average at the rate of less than sixty-four per cent. But in 1915 the full amount was paid, and in 1916, 1917 and 1918 the amounts already paid are a little less than seventy per cent and it can scarcely be assumed that nothing more will ever be paid during these years, and it would probably be unfair to credit the company with only seventy per cent in the future in fixing a rate. Nevertheless, I shall do so for the purposes of this case and allow the item in 1918 at two hundred and sixty-nine thousand dollars and in 1919 at one hundred and thirty-three thousand four hundred and sixty dollars.

c.) Real Estate of Corporations Tax.—This is a tax levied upon the "tangible" property in the streets of New York, and if the special franchise tax is valid at all, this property has already been once assessed and taxed. There is indeed an apparent injustice in disregarding a tax levied by the State in a case to which the State is in effect a party, yet there is an equal apparent injustice in crediting the plaintiff with a tax which it insists it will never have to pay, and which it will not pay if it pays a Special Franchise tax. In such a
168 dilemma the burden of proof must determine the issue and the item must be disallowed.

d.) Real Estate Taxes.—Only those taxes on property held to be used and useful should be credited. Referring forward to my calculation of the "rate-base," I deduct the following items:

	1918.	1919.
Block 982, Lot 13	$8,425.20	$5,521.60
Block 988, Lot 1	35,813.00	23,470.67
Block 1089, Lot 1	57,938.00	39,053.33
Block 1090, Lot 23	1,433.70	957.00
Block 1107, Lot 7	9,440.00	6,186.67
56% of Block 985, Lot 7	2,814.56	1,844.60
5% of Block 989, Lot 1	528.05	346.05
10% of Block 1457, Lot 6	1,699.20	1,113.60
1/3 of Block 3236, Lot 1	8,016.00	5,804.00
	$126,107.71	$84,297.52

e.) Personal Taxes.—The defendants' challenge as to personal taxes extends only to 1918, and rests upon the fact that the personal tax for that year was assumed to have been levied on gas property only, because that was done in 1919. The inference appears to me legitimate. I allow the item.

f.) United States Government Taxes.—This item is not challenged.

g.) Interest on Taxes.—The plaintiff very ardently argues that it should be allowed a credit of interest accruing on unpaid taxes. Except in the case of special franchise taxes it is hard to see any justification for such a credit. Nor does the case seem to me different as to them either. The only theoretical credit that I can see is the difference between the interest due upon so much as they will in the end pay, and the value of the money in their hands meanwhile. In the first place it is impossible to tell what they will pay,—if it were not, I should credit them with it,—and in the second it would be
169 a mere conjecture what was the value to them of the money in their hands.

The allowable taxes on the plaintiff were therefore for 1918 Eight hundred and thirty-one thousand six hundred and forty-five dollars and eight cents, and for 1919, Four hundred and sixty-eight thousand, ninety-two dollars and ninety-seven cents.

h.) Astoria Taxes. 1.) Real Estate.—In 1918 the Astoria company paid Two hundred and sixty-four thousand seven hundred dollars and fifteen cents, and in 1919 Three hundred and seven thousand eight hundred and nineteen dollars and thirty-six cents, which should be pro-rated for eight months at two-thirds, or Two hundred and five thousand two hundred and twelve dollars and ninety cents. 2.) Personal Estate.—1918, Eleven thousand one hundred and fifty-seven dollars and forty-one cents, 1919 Seven thousand six hundred and sixty-six dollars. 3.) Special Franchise.—1918, Three hundred and twenty-one dollars and seventy-three cents, 1919 Two hundred and ten dollars and ninety-two cents.

i.) Conduit Facilities.—As has been seen, the total investment in these conduits was Six million, seven hundred and twenty-two thou-

sand, thirty-seven dollars and twenty-nine cents, of which I credit the plaintiff with sixty-five per cent for reasons given later. Taking taxes at two and a half per cent on an assessment at say two-thirds of its value, or four million, five hundred thousand dollars, the tax will be One hundred and twelve thousand five hundred dollars, of which sixty-five per cent is Seventy-three thousand one hundred and twenty-five dollars for 1918 and Forty-eight thousand seven hundred and fifty dollars for 1919.

j.) New Astoria Plant.—There must for the future be figured an increased Astoria tax based upon the new plant now in process of erection, all of which I am allowing for reasons which will ap-
170 pear. The cost of that plant will be four million five hundred thousand dollars, and if I take the assessment at two-thirds, there will be added to the assessment three million dollars, on which the tax at two and a half per cent will be seventy-five thousand dollars for 1918 and fifty thousand dollars for 1919.

The total taxes, therefore, will be as follows:

	1918.	1919.
Consolidated Gas Co.	$831,645.08	$468,092.97
Astoria (present plant)	276,197.29	213,089.82
Astoria (new plant)	75,000.	50,000.
Conduits	73,125.	50,000.
	$1,255,967.37	$779,932.79

Taxes can hardly be thought to vary in proportion to production, and the proper spread should be the supposed sales to be effected within the period of the decree. I have taken these at twenty billions throughout. The tax factor is therefore for 1918 $.0628 and for 1919 $.0585.

Federal Income Tax.

The company has hitherto escaped any Federal Income Tax because the United States authorities have accepted its statement that it has no net income. However, this case proceeds on the supposition that an income must be allowed it and into the calculation of a fair profit that factor must surely enter, if the company is to be upon a level with freely competing industries. At present under the Revenue Act of 1918 (Sec. 230*a*, (2)), the tax upon corporations is fixed at ten per cent, and would amount to the following sums. Assuming a capital of sixty-four million dollars without franchises, and seventy-two million dollars with franchises, and profits at
171 six per cent or seven per cent, the results are as follows:

	Six per cent.	Seven per cent.
Including franchises	$432,000.	$504,000.
Excluding franchises	387,000.	448,000.

On a spread of twenty billions, these figures would become for each one thousand feet of gas, as follows:

	Six per cent.	Seven per cent.
Including franchises	.0216	.0252
Excluding franchises	.0192	.0224

These figures must clearly be allowed. In fact, the calculation should be higher since the tax will be levied upon the income without any deduction for the tax itself, but that is a small variation.

Renewals and Replacements and Gas Storage.

The company has carried on its books an account each year called "Renewals and Replacements" which is in fact an amortization account. Into this is put the loss arising from the abandonment of old plants, arrived at by subtracting the salvage of the plant from its cost on the books together with the cost of withdrawal. It is possible to obtain a long average of these charges by taking the amount of gas reported sold from December thirty-first, 1907, to December thirty-first, 1918, and using it as a divisor for the sums so carried on the books over the same period. The quotient is $.0373, which the master has taken at $.03. In these cases the conclusiveness of the master's report does not obtain, Knoxville Water Co. v. Knoxville, supra, and I shall use the more exact rate.

I figure the cost of gas storage based on the years 1918 and 1919 at $.0097.

The sum of these items is $.047, which I accept.

172 Present Capacity and Reserve.

As a preliminary to considering the "rate-base" and indeed as an inevitable element in deciding whether or not I should include the Fourteenth Street and Forty-second Street plants, it becomes necessary to take up the company's capacity and reserve compared with its present demands. If it should appear that any plant is necessary for the reasonable future, that plant must be included, as it is today, at least at its value in modern cost of reproduction. If, on the other hand, it appears that there is a reasonable doubt about that necessity, it should be excluded.

The rated daily capacities of the present plants of the plaintiff (including Astoria) are as follows:

Fourteenth Street	5,000	(coal).
Twenty-first Street	28,500	(water).
Forty-second Street	4,500	(coal).
Ninety-ninth Street	5,500	(water).
Astoria House A	10,000	(coal).
Astoria House B	10,000	(coal).
Astoria House C	30,000	(water).
Total	93,500	thous'd ft.

On January thirty-first, 1920, its send-out was 99,243 thousand feet. It is certainly not unreasonable to calculate its maximum send-out at one hundred million in the future. The defendants concede that the reserve should not be less than five per cent. The plaintiff believes that much more is necessary. If I put the total requirement at one hundred and five million feet I shall be probably shaving too close for safety, even at the present demand. The master's allowance of fifteen million cubic feet out of the thirty million now building at Astoria gives only eight and a half per cent. reserve, if the Fourteenth and Forty-second Street plants are included. If they
173 are not included the capacity is insufficient. It is clear therefore that either those plants must be included or more of the new Astoria unit.

The defendants urge that this is the wrong way to approach this subject, there being a whole system which may treat its reserve as one, and I will consider the capacity on that assumption. On January thirty-first, 1920, the maximum of the system was 166,488 thousand feet. Allowing only five per cent. reserve, the requirements are 175,000 thousand plus, which the system just has. Its resources at present are as follows:

Consolidated & Astoria (as above)	93,500
New Amsterdam	36,000
Standard	10,500
New York Mutual	24,000
Central Union	11,800
	175,800 thousand

If the two plants on Fourteenth Street and Forty-second Street are to be disregarded, the system has no reserve at all. The defendants must therefore either allow these two plants or some part of a new plant, because it is obviously already time to build. But when building a reserve, economy and prudence require a forecast of the future. The construction of a thirty million plant at Astoria decided on in December, 1919, was proper caution; some addition was needed, less would not have been economical. If this be added and the two old plants are disregarded, the system has a reserve of eighteen per cent., and the plaintiff as a member must bear its proportion of that amount; i. e., it must have a capacity of one hundred and eighteen thousand. As it has by hypothesis only eighty-four million left, it will be obliged to use sixteen million for its actual demands and the balance of fourteen million will be less than its share of
174 the reserve. In short, if the two plants are to be disregarded, the whole cost of the new plant must be part of the "rate-base."

I do not mean to decide that with the new plant the system has too large a reserve in twenty-three and a half per cent., which it will have. I only mean that since it was good policy when building to build so large a unit, the utmost that can be demanded under the most exacting theory is that if the old units are to be disregarded the whole of the new unit must be credited. The only question open is

whether the old units ought not also to be included. As I am not fixing a rate, I need go no further in this case than to take the doubt against the plaintiff.

Mr. Little made some elaborate calculations to show that the plants were not worked to capacity, but it is all irrelevant. Even if Astoria could make fifty-seven million feet a day and Twenty-first Street thirty-three million, and Ninety-ninth Street six million, the company could not fill its present demands. And if the system as a whole be considered and these, as I think wholly conjectural, hypotheses be accepted, the total capacity of the system becomes only 177,300 thousand cubic feet with Fourteenth Street and Forty-second Street excluded. This is a reserve above last year's demands of only 10,812 thousand cubic feet, or six per cent. plus. It is absurd to suppose that the time had not come viewed even under Mr. Little's assumptions in which new building must be done.

For these reasons in accordance with my plan of resolving all doubts against the plaintiff, I have excluded Fourteenth Street and Forty-second Street. I include the whole of the new Astoria plant. It is to be remembered that in so doing the "rate-base" is reduced much below what it would be if the new unit had been coal-gas plants, which would have cost twice as much. If the pro-
175 portion of coal-gas to water-gas had been in this way changed to about forty-five and fifty-five per cent., it would have involved capitalizing this unit at nine or ten million dollars at least. The addition of five million dollars to the "rate-base" so involved would add $.015 or $.0175 on a spread of twenty billions, according as the rate be taken at six per cent. or seven per cent. This makes the difference in distribution of coal and water gas count for less than one cent even on prices in 1918. It adds a reason for disregarding the theoretical division suggested by Mr. Little.

"Rate-base."

It is possible now to calculate the "rate-base" which is composed of the following items: Real Estate, Plants, Conduits Jointly Used, Office Buildings, the Present Astoria Plant, the Astoria Plant now Building, Working Capital.

If the plants be taken at their cost, there is logic in insisting, as the defendants do, that the land shall be taken in the same way, but I have for the reasons already given refused to do either. The value of the plants is, it is true, calculated upon the basis of cost, but not in any sense because I think cost the test; only because it is clear that at present anyway an estimate based upon cost is a most conservative one, and because it has the great advantage, as I have said, of avoiding conjectures based upon the opinions of experts.

a.) Land Used and Useful.—The real estate of the Fourteenth Street and Forty-second Street plants will come out of the "rate-base" along with the plants themselves, for the reasons which I have
176 just given under the heading, "Present Capacity and Reserve." This involves the following deductions:

Fourteenth Street:

Block 982, Lot 13	$326,000
Block 988, Lot 1	390,000
Block 991, Lot 1	180,000
Block 991, Lot 47	56,000
Total	$952,000

Forty-second Street:

Block 1089, Lot 1	$900,000
Block 1090, Lot 23	82,500
Block 1107, Lot 7	375,000
	$1,357,500

I shall take up seriatim the other pieces challenged:

Block 985, Lots 7, 19, and 20.—This space appears to have been used for storage and to be deemed necessary by the officers of the company, who think that they have no other available space. There is no sufficient reason to impeach their judgment. Nevertheless the westerly half of Lot 7 is occupied at present by two small holders and a boiler house. It is hard to see any use for them and no prospective use is suggested. I strike off one hundred thousand dollars at an estimate, or fifty-six per cent; the western half must be the more valuable.

Parcel 2, Lot 1, Block 989.—This easterly parcel contains a boiler plant and pumping station used in connection with two holders, one of the plaintiff, for thirty-two million feet, and the other of the New Amsterdam for five million feet. It seems that this should be prorated in that proportion between the two. The book cost to complainants seems to have been $20,643.84. I strike off three-eighths of $20,643.84, or $7,740.

Lots 29 and 30, Block 952.—Lot Thirty is an old machine shop used for storage purposes, seventy by sixty feet. In the summer of 1918 there was little in it. Lot Twenty-nine is vacant and
177 used for storage. The company asserts that its storage facilities are small. I do not think there is any sufficient reason to upset the discretion of the officers in retaining these lots.

Part of Lot 6 of Block 1457.—This is a very small matter but the lot seems for long to have remained unused, and an apportionment may be proper. I will strike off fifteen thousand dollars for this lot, some estimate must be made, and it will inevitably appear arbitrary under the circumstances.

The Westerly Three Hundred Feet of Lot 2 of Block 1157.—This was formerly the site of six small holders, the westerly end of the lot being occupied at present by two four-million foot holders. This is an expensive piece of real estate and it is not likely that the com-

pany would hold it unoccupied if it had no genuine prospective use for it. There is at most a great difference of competent opinion as to the relation between the maximum output and holder capacity and the officers of the company were not obliged to accept the figure of seventy-five per cent. suggested by Hine. Little figured it at 150% of maximum capacity, which the company has not. The property has been unused for only two years and I think the time has not yet come when the company must make up its mind whether it will sell it or put up new holders. I decline to interfere with their judgment as to this property.

Lot 18 of Block 1683, Lot 2 of Block 1712, the Easterly 281 Feet of Lot 5 of Block 1705.—The first of these, so far as the evidence shows, is used for a training school. Lot 2 of Block 1712 is most essential, as it gives access to the East River. The larger part of this property is used for the Astoria Company, and in view of the way in which the case has been treated, there is no reason to distinguish between it and the plaintiff. The easterly part of Lot 5, block
178 1705, is used for various purposes, part of them being in use by the National Coal & Coke Company. As the revenues of this company are charged against the plaintiff, no injustice is done in allowing the whole property as in its "rate-base." Strictly, perhaps, the item should be set-off, but the difference is too trivial for notice.

North End of Lot 1 of Block 3236.—Upon the south end of this lot is built the ten million foot Kingsbridge holder. This purchase was made after considerable public feeling had been manifested in that part of the city and as a concession to the citizens by the company, which was properly made. It was necessary at the time to buy the whole tract and the portion now criticized is in the market. I think it unreasonable to require the company to attempt any residential development of the northern part owing to the character of the land itself. It is true, however, that they have kept it unused for ten years without sale. It seems to me that a time has come when the sale should be made; at least as an alternative to keeping it a part of the property on which gas profits can be made. If I take off one-third of the value, say seventy-thousand dollars, I shall certainly not be unfair to the defendants.

These are all the prices questioned of those which the master allowed. The total deductions for the sum he awarded of $9,531,275, are as follows:

Fourteenth Street	$952,000
Forty-second Street	1,357,500
Block 985, Lot 7	100,000
Block 989, Lot 1	7,740
Block 1457, Lot 6	15,000
Block 3236, Lot 1	70,000
Total	$2,502,240

Leaving a balance	$9,531,275
	2,502,240
	$7,029,035

179 *b.*) Reproduction Value of Plants, Estimated from Then Cost.—The books of the company show the cost of all its plants and the summaries in evidence go back to 1884, when it was organized. I have taken only those plants which remain open on the books and not all of these. The figures as of December thirty-first, 1918, are as follows:

Stations	Book value.	Part of plant condemned.
21st St. station (plant)	$3,816,273.52	
44th St. station	2,004,996.31	$1,290,412.67
63rd St. station	401,204.48	
65th St. station	817,105.37	
99th St. station (plant)	1,158,402.97	
111th St. station	1,085,862.26	
Kingsbridge holder	912,299.04	
132nd St. station	475,896.74	
132nd St. testing station	7,450.	
14th St. holder as adjusted	584,485.20	
Engineering item	323,907.59	
Total	$11,587,883.48	$1,290,412.67
Deduction for part of plant condemned	1,290,412.67	
	$10,297,470.81	

Hine's figure for these items is $9,979,935.72, which varies in substance only as to the 111th Street station. That difference arose from his exclusion of Blocks 1704 and 1712 and 1683 as not used and useful, in which I do not agree with him, as I have said.

The books also have corresponding figures for meters, mains and services, constituting the whole fixed plant of the company.

The whole account for plants, etc. can therefore be stated as follows:

Plants	$10,297,470.81
Meters, etc.	6,631,454.32
Mains	11,027,266.54
Services	1,272,241.74
Total	$29,228,433.41

180 This calculation makes no allowance for depreciation, although the method by which the present value is reached is from original cost, which, as I have said, should always bear that

factor in mind, even though it need not necessarily include it, when the plants have been kept up. Depreciation Maltbie and Hine figure at $6,507,400, and the answer at once occurs, that it is from any point of view more than met by the increased costs of present reproduction. Such, indeed, is the evidence so far as mere opinions and calculations of experts can justify a conclusion. Besides, there is a check, curiously conclusive at least to me, upon the cost of the plants. As I have said, the Astoria plant of thirty million foot water-gas now building will cost $1,500,000, to be completed by December of this year. The contract was let in December, 1919, and forms a good test of what the costs then were for such units, better, probably, than the opinions of witnesses. It is a fair inference from that contract that the cost in such large units was not less than one and a half millions per ten million feet capacity, and so Addicks takes it. The capacity of the only two water-gas units on Manhattan is thirty-four million, making at such rates a cost of $5,100,000. The book cost is a little short of five million dollars, a surprisingly close parallel. Therefore, judged upon the basis of their present capacity, I may assume that the reproduction value of the Manhattan plants is at least their book value. It is of course true that in so doing I have not made any discount because they are old; I have taken the standard to be the cost of fixed capital sufficient to render the service in question and for the reasons already given. Maltbie figured a "straight-line" depreciation of three and half millions, for all plants and holders. This was necessarily a conjecture, based upon the supposed life of the plant; it has no application while the plant is kept up. It is quite true that there is no such check upon holders
181 and stations as in the case of plants, but on the other hand so far as opinion evidence can show, it appears without contradiction that to reproduce these would now cost a great deal more than their book cost.

The other elements of depreciation are for mains, about one million five hundred thousand dollars, and services and meters, one million five hundred thousand dollars. Any depreciation in the mains appears to me quite fanciful. Little said that the life of a main when properly buried was indefinite; the only question is of obsolescence and repairs, and I should suppose that obsolescence would occur only after it got too small for its requirments. It might of course be possible to show that all necessary mains could now be laid for less than the book costs, but the plaintiff has shown the contrary by Miller, and it is not contradicted.

As to meters and services the case is not so strong because even if their life be seventy-five years, as Little thinks, no one knows the age of all those in use. Moreover, the depreciation of one million five hundred thousand dollars is only about twelve per cent of their cost. However, the same rule applies as before. The plaintiff proved the cost and the necessary repairs to bring the whole plant up to its original condition. It proved that the cost of reproducing fixtures of equal capacity was more than the book cost. That made a case in my judgment which was proof against any theory of

"straight-line" depreciation. The allowance for repairs might be attacked on the ground that the condition of the plants and fixtures in fact required inordinate repairs, but that was not done. In accordance with the principle which I have tried to demonstrate I decline to make any allowance for depreciation.

182 *c.*) Conduits Jointly Used.—I have already given my reasons for taking all the conduits used by the Astoria company rather than the Astoria tunnel alone. For the rate base the figure is fifty-seven per cent. of $6,723,037.29 or $3,832,131.25. However, since the Fourteenth Street and Forty-second Street plants are excluded, it is hardly fair to count only fifty-seven per cent of the value of these conduits as allocatable to the plaintiff. I must assume that all the gas used by it will come through one or the other of these conduits except what can be made at Twenty-first Street and Ninety-ninth Street. This would very substantially increase the proportionate use of the tunnels, but it would be hard to say exactly how much. In taking the valuation at $4,400,000, which is sixty-five per cent. plus I should be within a safe estimate, and I so take it. I am supposing the Astoria capacity to be raised from fifty to eighty million cubic feet a day.

d.) The General Office Building and the Fifty-seventh Street.—In 1914 the company erected a very large office building in New York as a place of business not only for itself but for its allied companies including the Edison Company. This is nineteen stories in height and contains besides offices proper many adjunct rooms, such as an auditorium, a restaurant, telephone booths, and other conveniences not only for the needs but for the rest and pleasure of the tenants. Its costs was $2,542,615, and the value of the land was $410,000, making an investment of $2,952,615 in all. In view of the fact that the greater part of this building was not used for gas purposes it became necessary to apportion the space between the company and its other tenants. Estimates were made as of various dates, the last being July first, 1919. At that time the company's occupation was claimed to be 113,785 square feet, (including its share of the com-

mon conveniences), out of a total of 294,445, 38 per cent

183 of the whole. The question as I view it is only how much of the investment can properly enter into the rate base. Dr. Weber did, it is true, figure the total rentals of the property and charge them against the plaintiff, but that would not be gas income anyway. I need only find the amount of the building properly allocatable to gas business for use in the "rate-base". Strictly speaking a portion of the upkeep should also be credited to costs of distribution, but that is either included in another item, or has been omitted. It can hardly be of much consequence. I shall therefore consider only the apportionment in determining the "rate-base". As such, in view of the fact that the company has claimed only about 35 per cent. of the whole, the time and testimony spent upon it were hardly justified; at that percentage it would only bring into the "rate-base" a little over one million dollars.

Some allowance of course must be made; the defendants wish me to strike out eighty thousand square feet actually occupied, leaving only about $255,000 in the "rate-base," which is most unfair. Still the impossibility of precise allocation in any event, the estimate at best resting in supposition, requires a rough estimate. It is agreed that the Edison Company has sixteen hundred employees in the building, and the plaintiff eight hundred. The total space, including that assigned for the common conveniences, assigned to the Edison Company, was 123,631. If I divide this in half and then add something in view of the fact that the higher paid employees of both companies get a larger space in any event, I can safely allot seventy thousand square feet to the plaintiff. This would leave 43,785 square feet of the building unoccupied, on the theory that the plaintiff's employees might be less spread out than they are.

But the building was rightly built for the future and I shall
184 assume that the space so theoretically vacant will be occupied in the future in the same proportions as that now occupied. I find also that that extra space was prudently built in 1914. In short, I shall deduct it from the total space and so give the plaintiff a percentage of twenty-eight upon the whole investment, i. e., $46,732.20.

The Fifty-seventh Street building was built as another office in 1918 and is used only by the company. The question was debated and advice taken upon it, whether it should be a high building or not, and after consulting competent real estate brokers it was decided to build a low building. The defendants complain because that advice was followed. I decline to harry the company with such factious vexations; their discretion may or may not have been right but there is no ground to say that a clear error was made.

As to the site, the company had the right to build upon a thoroughfare, not on a side-street. The public convenience justified it in having its quarters where they would become generally known; it might also have an eye out to the advertisement from such a location. Municipal authorities wisely select such streets for their enterprises. I allow the sum, land four hundred thousand dollars, building, $294,718.47.

The total of these is $1,541,450.57, to be added to the rate base.

c.) Present Astoria Plant.—The present Astoria plant was begun in 1906, and there had been expended up to October 31st, 1919, $15,497,615 upon land and fixtures. This sum must come into the "rate-base" unless some part of it is not necessary for gas purposes. The defendants challenge the amount of land purchased, contending that less would have been enough, because much of it is not now in
actual use. In 1914, however, when the Astoria company
185 applied for leave to issue $14,500,000 of securities, the Public Service Commission granted that leave and it appears that the engineers of the Commission had tested all expenditures by the vouchers to the extent of seventy-five per cent. Section Sixty-nine of the Public Service Law authorizes issues only in case the expenditures have been "reasonably required" for the purposes of the com-

pany. People ex rel. D. & H. Co. v. Stevens, 197 N. Y. 1, was decided before the amendments of 1910 and it was clearly stated in People ex rel. B. L. H. & P. Co. v. Stevens, 203 N. Y. 7, 21, 22, that the commission might withhold its consent to expenditures not in the nature of permanent capital. There can be no question, I think, that the Public Service Commission could have refused to consent to the issue because all the land was not necessary and that it is too late now to take a contrary position. At that time the fixed capital account was but a little above the issue authorized.

I shall, therefore, take it that viewed in the light of prospective requirements and the advancing cost of land, the whole area is reasonably necessary. I therefore allow the sum as of October thirty-first, 1919.

f.) Astoria Plant Now Building.—The value of the Astoria plant now building is concededly $4,500,000, and for the reasons already given I include it.

g.) Working Capital.—For working capital I take two million dollars, not because I mean to fix any such sum, but as a conservative compromise between the plaintiff's figure of $3,800,000 and Maltbie's of $1,180,000. It is in fact probably much too low, and it is clear that in spite of his subsequent testimony Little meant originally to say that there was a fairly constant proportion between working capital and production. His figure of twenty cents
186 which at that time he gave as a minimum is twice what I have taken here.

h.) Recapitulation.—The "rate-base" so figured without any allowance for franchises is as follows:

Land	$7,029,035
Plants	29,228,433
Conduits jointly used	4,400,000
Office buildings	1,541,450
Present Astoria plant and land	15,497,615
New Astoria plant now building	4,500,000
Working capital	2,000,000
	$64,196,533

This "investment" therefore comes on a basis of nineteen billion feet to a capitalization of $3.36 per thousand cubic feet, or $3.63 with franchises included. This is certainly too small. Little swore that in 1914 it was the consensus of engineers that a water-gas plant would cost two dollars and eighty cents and that the present costs would be double that amount, or five dollars and sixty cents. Coal-gas plants are much more expensive. It is more than probable that the plaintiff's whole investment is therefore properly valued at one hundred and fifteen millions at present prices, or twice what I have valued it at. But I go along with the master, since the result is in any case the same, in adopting the piece-meal method of valuation. That might be improper if a rate were to be fixed.

Account Stated of the Plaintiff with the Rate.

I am now in a position to state the account of the plaintiff with the rate, taking the revenues as $.7991 for gas sold and $.073 for other gas revenue, $.8721 in all. $.073 is higher than either in 1918 or the first eight months of 1919. It is $.0002 lower
187 than the twelve months ending October 31st, 1919.

1918.

Cost of production		$.3964
Cost of distribution		.1846
Taxes		.0628
Renewals and storage		.0470
		$.6908
Revenues	$.8721	
Expenses	.6908	
Available for profits	.1813	

1919.

Cost of production		$.4519
Cost of distribution		.1978
Taxes		.0585
Renewals and storage		.0470
		.7552
Revenues	$.8721	
Expenses	.7552	
Available for profits	.1169	

Upon a suppositious twenty billion spread, the income on 1918 costs would be $3,626,000, which must bear a Federal income tax of ten per cent. The net would be $3,263,400. On 1919 prices the net income would be $2,104,200.

I may now determine in percentages the possible earnings of the plaintiff upon four different hypotheses: the costs of 1918 with and without including franchises and the costs of 1919 under the same alternatives.

	1918.	1919.
Excluding franchises	5.08%	3.28%
Including franchises	4.53%	2.92%

Such is the final result, and so it appears that even though the "tangibles" of the company are valued, not on the estimates
188 of experts, but upon their cost,—except in the case of the land,—the company will not much more than earn upon them 5% on the basis of 1918 costs, or 3¼% on the basis of 1919 costs.

If the franchises are added the earnings will be 4½% on the basis of 1918 costs and 3% on that of 1919. As the 1919 prices have now obtained for over a year and a half, it is fair to say that in a long enough future to call for some relief, that the company cannot earn more than 3¼% on its "tanglibles" alone. I doubt very much indeed whether on the present value of the "tanglibles," as gathered from estimates of the most competent persons available, which is really the only way in which it can be reached at all, the company can earn more than one and a half per cent, though such estimates are of course somewhat speculative. This result was indeed to be expected. It is scarcely possible that a rate fixed in 1906 to give a fair return and presumably no more than a fair return, should today be adequate. In the figures I have used I think it clear that everything has been pared down unsparingly, and I take this occasion to say what I have already alluded to more than once already. It would be most unfair to accept any of these figures in fixing a rate. The attitude of a court is very different; it does not try to do justice between the company and the public, but only to see whether the actual rate can by any possibility still be a fair rate. In so doing it must take everything in favor of the rate. It would be the height of injustice, if, in view of that attitude, its conclusions so reached were treated as a fair basis for fixing a new rate. Furthermore, I have not hesitated to cut more ruthlessly in this case than if the result had been closer.

I conclude that the statutory rate has become unfair and violates the Fourteenth Amendment while present prices continue. The defendants must be restrained for the present from enforcing it and such a decree will pass.

189 Exceptions to the Master's Report.

I am somewhat embarrassed as to how to deal with the exceptions filed. I have not found it necessary to consider in most cases what were the actual facts, but only whether with every allowance they could support the rate. Nor do I think it necessary to go through all the multitudinous exceptions and make a finding on each one. I decline to do this, because in Knoxville v. Knoxville Water Co., 212 U. S. 1, the Supreme Court has said that in rate cases a master's findings even when confirmed will not have the effect they usually do but will at most be persuasive. This I think relieves me of the necessity of passing on each exception since it would be without legal force. The two opinions of the master and myself show the extent of our agreement and difference, and so far as the findings have any persuasive effect, when I agree with them, that appears. In general they may be regarded as overruled in so far as my opinion varies from his and otherwise sustained.

Form of Decree.

Strictly the decree should merely enjoin the defendants from enforcing the statute and leave the plaintiff to fix such rates as it may

choose, collecting them until the State takes some further action. That result I am unwilling to accept because it relieves the company from any regulation meanwhile and exposes the public to its estimate of what a fair rate should be. On the other hand, owing to the casus omissus in the law by which the Public Service Commission has no authority to fix rates above the statutory maximum, I cannot avoid this result unless I fix a rate myself or provide what I shall describe in a moment. No one suggests that I have the
190 power to fix a rate and obviously I have not; it is a prerogative of the Legislature, delegated usually to the Public Service Commission. But as an injunction is discretionary it is possible to annex equitable conditions to it and this I should do. The Legislature will meet on January first and can readily give power to the Public Service Commission or can fix a rate itself, and it appears to me that the proper course is to anticipate that action. That is to say, I think conformity with the State law is best secured by making the rate when fixed either by the Public Service Commission or the Legislature relate back to the date of this decree. This is a very simple thing to do, because the moneys collected in excess of eighty cents must in any event be impounded pending an appeal, and the appeal can hardly be determined until after the Legislature has had an opportunity to act. I have therefore provided that the special master appointed by the statutory court, who is to receive all moneys over eighty cents shall hold the same until a new rate is fixed, but not later than March first, 1921, and shall distribute them as though that rate had applied from the date of the decree.

Moreover, in spite of the plaintiff's liability, so established, ultimately to account for any sum now collected, I think that there should be some limit placed upon the sum now to be collected as security. This sum is the utmost that the plaintiff can ever receive for that period, and it should cover any rate which is within reasonable expectation. Just as when deciding whether an actual rate is invalid a court must take all doubts in favor of the rate, so when fixing a security, it should take all doubts in favor of the plaintiff's claims. In neither case has its findings any proper relation to the rate which in justice might be established by the authorities; it is concerned only with limits.

191 Now the master found that the company's profit was not more than $8.0173 on a capitalization of $75,000,000. This would mean on a spread of nineteen billions an income of about $900,000. At eight per cent the net income should be $6,000,000, requiring a gross profit of 6,700,000 in order to pay income taxes. In short, on a spread of nineteen billions the rate would have to be $1.10 in order to make the profit which the master thought the company should get.

The company's figures are higher. They claim costs of manufacture in 1920 of $.56 and distribution costs of $.23 and taxes of about $.09. This with the amortization charge of $.035 comes to $.915 and shows a loss of $.0421 or on a spread of nineteen billions of about $800,000. It does not very definitely appear what the plaintiff claims for its "rate-base". It has put in proof that its property is worth

$150,000,000, and urges that sum, but I am not clear that it means to demand 8% on that capitalization. At 8% that would require a net income of $12,000,000, and a gross before Federal income taxes come out of about $13,300,000., which with a loss of $800,000., would be $14,000,000. On a spread of twenty billions this would mean an advance of seventy cents, not thirty cents, as resulted from the master's findings.

I believe that it is reasonably clear that such an advance will under no circumstances be allowed and I think it best to accept the master's "rate-base" provisionally with the single exception of adding the full amount of the new Astoria plant. This makes a base of $77,000,000., and requires an income at 8% of $6,160,000., which with income taxes means $6,800,000., and which with $800,000. loss is $7,600,000. At a spread of nineteen billions this is forty cents, making the rate $1.20 instead of $1.10. It appears to me that it is within the bounds of possibility that the rate may be fixed so high when it is, and since the plaintiff must eventually account
192 with the future rate in any event, I think it fair to protect it against the possibility that it may be so fixed. Any hardship to the public appears to me answered by the plaintiff's inability for any period to escape the jurisdiction of the State authorities.

I have provided that if the State does not act before March first, 1921, the plaintiff shall have all the funds and shall be free to charge what it pleases. Such inaction would indicate that the State was contented to leave the matter in that form if the decree were affirmed. If so, I should of course no longer interfere with the plaintiff in its pursuit of its rights. While that possibility is in fact too remote to be really very practical, nevertheless the decree must provide against all possible contingencies.

Stay Pending Appeal.

The decree itself fixes most of the questions which will arise pending the appeal. The stay need only provide in addition for the possible period beyond March first, 1921, before the appeal is decided. Of course it should not attempt more than to subject the sums impounded to the mandate of the Supreme Court; that Court will have before it all the case and can make such final decree as it chooses.

I file herewith decrees in accordance with the forgoing.

August 4, 1920.

LEARNED HAND,
D. J.

U. S. District Court, S. D. of N. Y. Filed Aug. 4, 1920.

193 *Decree.*

United States District Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; Lewis Nixon, Constituting the Public Service Commission of the State of New York, First District, and Edward Swann, District Attorney of the County of New York, Defendants.

This cause came on again to be heard at the July, 1920 Term of this Court and was argued by counsel, and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that the defendants, Charles D. Newton, as Attorney General of the State of New York, Edward Swann, as District Attorney of the County of New York, and Lewis Nixon, constituting the Public Service Commission of the State of New York for the First District, their successors, agents, servants and employees, be, and each of them hereby is, restained for a period of five years from the date of the entry of this decree from suing for any penalty or forfeiture described in Chapter 125 of the Laws of 1906, or from in any other way enforcing, or attempting to enforce, the said Act, or from enforcing, or attempting to enforce, an order of the Commission of Gas and Electricity of the State of New York made on the twenty-third day of February, 1906, directed
194 against the plaintiff herein, or from taking any action under the Public Service Commission Law to enforce said statute or said order; and it is

Further ordered, adjudged and decreed, as a condition of the continuance of the injunction hereinbefore granted, that until March first, 1921, or until the earlier promulgation of a gas-rate applicable to the plaintiff by some competent authority of the State of New York, the plaintiff shall neither charge nor collect for the sale of gas in the City of New York more than the sum of One dollar and twenty cents per thousand cubic feet. And it is

Further ordered, adjudged nd decreed as a further condition upon the continuance of said injunction that until March first, 1921, or until the earlier promulgation of such gas rate by such authority the plaintiff shall on the fifteenth day of August, 1920, and on the fifteenth day of each succeeding month, pay to Richard Welling, Esq. (who is hereby appointed special master for that purpose), out of all moneys collected by it for sale of gas in the City of New York the following sums: All sums in excess of eighty cents collected from all consumers other than the City of New York; all sums in excess of seventy-five cents collected from the City of New York. And it is

Further ordered, adjudged and decreed that the said special master shall deposit all moneys so paid to him, equally in accounts in

his name as special master in the New York Trust Company, the United States Mortgage & Trust Company and the Title Guarantee Company at such interest as he can best obtain, to be withdrawn therefrom only upon order of this court. And it is

Further ordered, adjudged and decreed that the said special master shall hold said moneys until March first, 1921, or until the earlier promulgation of such rate, as aforesaid, and upon the earlier promulgation of such rate the said special master shall, by order to be obtained by him, distribute the moneys so collected with accrued interest, in accordance with such rate as though the same had been in effect from the date of the entry of this decree; but if no such rate shall have been promulgated on or before March first, 1921, then he shall pay over the sums so collected with accrued interest to the plaintiff. The said special master in either case to retain therefrom his expenses and allowance when fixed by the court. And it is

Further ordered, adjudged and decreed that at any time while the injunction hereinbefore granted shall remain in force, any party hereto, including the successor in office of any of the defendants, may apply upon notice at the foot hereof to vacate, modify, or extend the foregoing injunction because of any change of circumstances since the entry hereof; or for any additional relief to which he or it may become entitled. And it is

Further ordered, adjudged and decreed that the plaintiff do recover its costs and disbursements when duly taxed of the defendants to be borne equally between them, and that the allowance and expenses of Abraham S. Gilbert, Esq., the special master appointed to hear and report herein, shall be fixed by the court upon motion made by any party hereto, or by the said special master and shall be paid by the defendants equally or upon their default, then out of the fund to be collected as hereinbefore described.

August 4, 1920.

LEARNED HAND,
U. S. D. J.

U. S. District Court, S. D. of N. Y. Filed Aug. 4, 1920.

196 *Decree.*

United States District Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; Lewis Nixon, Constituting the Public Service Commission of the State of New York, First District, and Edward Swann, District Attorney for the County of New York, Defendants.

This cause came on to be heard at the July, 1920, Term of this court and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that in case the defendants or any one of them shall within thirty days after the entry of final decree herein appeal therefrom to the Supreme Court of the United States, then and in that case the conditions imposed upon the continuance of the injunction in said decree shall continue until the determination of such appeal and the special master appointed in said decree shall not distribute the moneys collected by him until such determination. And it is

Further ordered, adjudged and decreed that all moneys so collected by said special master in accordance with such decree shall at all times be held subject to the order of this court upon mandate of the Supreme Court of the United States.

August 4, 1920.

LEARNED HAND,
U. S. D. J.

U. S. District Court, S. D. of N. Y. Filed Aug. 4, 1920.

197 *Supplemental Opinion.*

United States District Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; Lewis Nixon, Constituting the Public Service Commission of the State of New York, First District, and Edward Swann, District Attorney of the County of New York, Defendants.

Supplemental Opinion.

Motion to Modify the Decree and Stay.

LEARNED HAND, *D. J.*

The plaintiff now moves to modify the decree of August 4, 1920, in three particulars; first, the provision for depositing the excess over eighty cents impounded; second, the "retroactive" effect of the new rate when fixed, third, the absence of findings. It also moves to amend the stay by a provision seeking to expedite the appeal.

Provisions for Deposit of Moneys Impounded.

The plaintiff urges with force, I think, that to impound all the moneys over eighty cents for a period perhaps of a year will
198 cause loss both to itself and to the consumers. It suggests that it have the right to substitute adequate securities. The best that the special master can get on the deposits is probably three and a quarter per cent; the plaintiff if required to finance its temporary requirements must pay much more, it says fourteen per

cent. In any case it will sustain a loss which will profit no one but the banks, so far as appears. I see no advantage in insisting upon impounding the moneys if adequate security can be otherwise provided. I shall therefore modify the decree by allowing the plaintiff to deposit with the master in lieu of cash Liberty Bonds taken at their market value, or any other bonds which are a proper investment by savings banks in New York. These may be deposited with the special master originally or money already deposited may be drawn out from the banks upon substituting such bonds. The special master will be charged with the duty of calling upon the plaintiff for more bonds whenever their value equals that of the cash for which they are a substitute. In order to avoid repeated calls for such security I have therefore provided that the plaintiff shall in each case originally deposit one hundred and three per cent of the cash and that when their market value is equal to the cash he shall call upon the plaintiff to deposit additional bonds up to one hundred and three per cent of that cash. The interest upon these bonds accruing during the period of his possession shall be a part of the fund.

Also I will allow the plaintiff to substitute surety company bonds for cash or to withdraw cash by giving such bonds, on the following conditions: No single company shall give a larger bond than $500,000 or more than one bond. The bond must secure not only the cash for which it is substituted but interest at seven per cent during the period of its existence, which is to be part of the fund.

199 The plaintiff must be a party to all such bonds and the surety company one of those recognized by the rules of this court. Provision must be made for the possibility of delays and extensions of time. I have required a substantial rate of interest because the plaintiff will be in effect using the consumers' money. On the one hand the consumer profits by getting more than he could from the banks, on the other the plaintiff profits by being relieved from high rates of interest. The rate at which the plaintiff has sold its bonds is seven per cent and on short financing the rates are much higher. I think that seven per cent should be the rate, even though the plaintiff must pay a premium to get the bond; it will recover back all that the consumers are not eventually entitled to. In result, if I take the plaintiff at its word, the opportunity will remain favorable to its acceptance. Such bonds ought not to exceed two-thirds of the total payments required.

The Conditions Imposed upon the Injunction.

The second point urged is that I have exceeded my jurisdiction by imposing as a condition upon the continuance of the injunction that the fund deposited as security shall be distributed retroactively in accordance with the new rate when promulgated. The argument is that by so doing I have in effect assumed the power of the New York Legislature and during this period have substituted a rate of my own making where no rate existed. Of course if I were to try to impose any such rate by any sanction other than the inducement offered by the injunction, this would be clearly true; it is equally

clear that the only sanction is the injunction. If the plaintiff were absolutely entitled to an injunction as soon as the rate became confiscatory, it would also be true that the conditions I im-
200 pose are unlawful. The plaintiff is not, however, absolutely entitled to an injunction, it is an equitable remedy and may be refused except on equitable conditions (Waldon v. Bolley, 14 Pet. 156, 164); the rule is of course most ancient and of the widest application. It has in effect been imposed in very similar circumstances (State R. R. Tax cases, 92 U. S. 575; Cummings v. Natl. Bank, 101 U. S. 153; People's National Bank v. Marye, 191 U. S. 272, 282-288). Norwood v. Baker, 177 U. S. 269, 291-294, a special assessment case, is perhaps to the contrary in effect, but only because the authorities were free to make the proper assessment. It is analogous to the situation here if the Public Service Commission had now jurisdiction to make a rate. In the other cases the taxpayer who assailed the validity of the rate was obliged to pay the proper amount of the tax, in advance, as a condition of relief. In one sense these cases go further than the decree already entered herein, since they involve an assessment and levy by the court itself. In another perhaps they do not go so far, because there is now no law applicable to the plaintiff.

If the plaintiff is right I cannot limit the rate charged in any way. Once the statute is in abeyance its rights are unregulated altogether. This is contrary to the practice, at least in this District, of fixing a rate pendente lite. The court must have as little jurisdiction to assume legislative prerogatives on application for temporary injunction, as on final decree. If the plaintiff's argument is good at all, it requires me to free it from all limitation as soon as the statute is found confiscatory. That argument proves too much.

There is no doubt that viewed as power alone, I might absolutely fix a rate as a condition of granting any injunction, and it makes no difference whether that rate lasted six months or six years. Any other and lower rate fixed by the State would of course
201 in effect supersede it, but the condition of the injunction would continue to be legal. If the plaintiff chose to disregard it, it would suffer nothing but the loss of the injunction. It would then have to deal with the State authorities. That rate would be as good if fixed in a final decree as if fixed pendente lite or pending an appeal. But the question of power is one, and the propriety of its exercise another. I recognize that the condition I have imposed is new, but it seems to me the minimal interference with the functions of the State as the rate-making body. The jurisdiction to suspend rates is at best somewhat invidious, and should be limited so far as possible to constitutional requirements as they now exist. Generally there is in existence a body which can at once assume jurisdiction; that will in such cases serve, but here it will not. Given this circumstance no better way occurs to me to limit the interference of this court with the action of the lawful authorities.

The plaintiff, however, appeals a little in misercordia; it says that having suffered several lean years it should be allowed a short period of milk and honey. The presupposition is that the rate when fixed

will be inadequate. Perhaps so, but it is scarcely an argument to which as a judge, and especially a Federal judge, I ought to listen. Within the limits which the Supreme Court has laid down I suppose the Legislature of New York may grant rates which will give questionable inducement to public service companies. They have the power, and if its exercise prove impolitic, judges have nothing to say. The new rate when established must be enough under the rules or it will be again invalid; short of that it will stand. One may say, if one likes that form of statement, that it must be presumed adequate till the contrary appears.

I decline to change this feature of the decree.

202 Incorporation of Findings in the Decree.

I have already considered this question, but the plaintiff is very insistent that some disposition should be made of the exceptions. In Oliver v. Platt, 3 How. 333, the decree did not dispose of the exceptions and Justice Story ignored the defect. In Kelsey v. Hobby, 16 Pet. 269, 276, the court held that where the matter was not of an exact sum due and all the evidence was in the record, it was not improper to confirm the report as a whole. A distinction should be drawn between the case at bar and one like Kimberly v. Arms (129 U. S. 512, 523-525), where the reference was of all the issues on consent and to hear and determine, and when the findings are well-nigh conclusive. In the case at bar the reference was not on consent—though without objection—and it was only advisory in any case.* In such cases "the report has no legal sanction and no further weight than such as attaches to it by reason of the fact that it may embody the researches and conclusions of an intelligent master" (Street, Fed. Eq. Prac., § 1516). It is, therefore, really of no consequence to dispose of the exceptions for these reasons and quite independently of the fact that this is a rate-case.

However, the point is doubtful and rather than leave it open to any difficulty on appeal I have in the amended decree confirmed specifically all these findings which I mean to confirm, and have declared that the other parts of the report are to be deemed superseded by my opinion. This can leave no doubt whatever as to what parts

203 of the report I mean to stand. Unless I were to make findings in the declaratory part of the decree, which is never necessary (Street Op. Cit., § 1964), I could not do more than refer to the opinion, which I have done.

I would not be understood to disagree with the master in so far as I have not confirmed his report. Our difference resulted from the fact that I bore much more heavily than he against the plaintiff. This might not have been a feasible disposition of the case, had the result been more doubtful. I have generally, though not always, felt justified in making conclusions not based upon the actual facts.

*The order read that the special master was "to take all of the testimony and evidence respecting the issues herein, make all needed computations and fully find the facts; but nothing herein contained shall be construed as meaning that the special master's findings of fact shall be final, but only that he shall find the facts for the purpose of aiding the court and making his recommendations."

but upon the least allowance which could fairly be taken for the various items. Obviously a difference between my results and the master's does not indicate that I should not agree with him, but only that I followed a different plan in dealing with the case. As it is always proper for the court to make its own findings (Henderson's Chancery Practice, 487), it becomes unnecessary to do more. As now drawn I think the decree is certainly open to no procedural challenge.

Stay Pending Appeal.

I have introduced the provision suggested by the plaintiff in the stay. Perhaps it is not important, but it may help expedite the appeal.

I file herewith an amended decree and an amended stay.

August 11th, 1920.

LEARNED HAND, *D. J.*

U. S. District Court, S. D. of N. Y. Filed Aug. 11, 1920.

204 *Amended Decree.*

United States District Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; Lewis Nixon, Constituting the Public Service Commission of the State of New York, First District, and Edward Swann, District Attorney of the County of New York, Defendants.

This cause came on to be further heard at the August, 1920, Term of this court and was argued by counsel; and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that the decree of this court hitherto entered herein on the fourth day of August, 1920, be and the same hereby is amended so as to read as follows:

205 United States District Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; Lewis Nixon, Constituting the Public Service Commission of the State of New York, First District, and Edward Swann, District Attorney of the County of New York, Defendants.

This cause came on to be further heard at the July, 1920, Term of this court and was argued by counsel and thereupon, upon consideration thereof, it is

(1) Ordered, adjudged and decreed that the exceptions to the following numbered findings of the special master in his report proper filed herein May 6, 1920, are overruled:

One, two, three, four, five, modified by adding after the words "constituent companies," the words, "excepting certain expired rights to open streets for new mains," six, seven, eight, nine, ten, eleven, twelve, thirteen, fourteen, fifteen, sixteen, seventeen, eighteen substituting for the phrase, "have been kept in conformity with said rules and regulations" the phrase, "have been kept in substantial conformity with said rules and regulations," nineteen, twenty
206 twenty-one, twenty-two, twenty-five, twenty-six, twenty-eight twenty-nine, thirty-three, forty, forty-one, forty-three, forty-five, forty-six, forty-eight, fifty, fifty-two, fifty-three substituting for the phrase, "have included in lieu thereof one-half of the additional investment required for the new water-gas unit," the phrase, "have included in lieu thereof and of the Fourteenth and Forty-second Street plants the whole of the additional investment required for the new water-gas unit," sixty-two modified by striking out the words, "showing a net profit with complainant company as of September, 1919, of not more than 4.73 per thousand cubic feet of gas sold," sixty-six, sixty-seven, sixty-eight, seventy-one, seventy-five, seventy-seven. And it is

(2) Further ordered, adjudged and decreed that the other exceptions to the report of said master and to his opinion as incorporated in his report are sustained, and that there are substituted therefor as findings of fact and law the findings set forth in the opinion of Learned Hand, D. J., filed herein on August fourth, 1920. And it is

(3) Further ordered, adjudged and decreed that Chapter 125 of the Laws of 1906 of the State of New York in so far as it prohibits the plaintiff herein from charging or receiving more than eighty cents per thousand cubic feet for the sale of gas in the Borough of Manhattan has been since January first, 1918, and now is confiscatory, and that said law deprives the plaintiff of its property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States. And it is

(4) Further ordered, adjudged and decreed that the said law since January first, 1918, has been and now is invalid, as violative
207 of said Amendment, that the plaintiff has no adequate remedy at law for any injury resulting from the enforcement of said law except by injunction, and that it is entitled to the relief hereinafter prescribed. And it is

(5) Further ordered, adjudged and decreed that the defendants, Charles D. Newton, as Attorney General of the State of New York, Edward Swann, as District Attorney of the County of New York, and Lewis Nixon, constituting the Public Service Commission of the State of New York for the First District, their successors, agents, servants and employees, be, and each of them hereby is, restrained for a period of five years from the date of the entry of this decree from

suing or any penalty or forfeiture described in Chapter 125 of the Laws of 1906, or from in any other way enforcing, or attempting to enforce, the said Act, or from taking any action under the Public Service Commission Law to enforce said Act; and it is

(6) Further ordered, adjudged and decreed, as a condition of the continuance of the injunction hereinbefore granted, that until March first, 1921, or until the earlier promulgation of a gas-rate applicable to the plaintiff by some competent authority of the State of New York, the plaintiff shall neither charge nor collect for the sale of gas in the City of New York more than the sum of One dollar and twenty cents per thousand cubic feet. And it is

(7) Further ordered, adjudged and decreed as a further condition upon the continuance of said injunction that until March first, 1921, or until the earlier promulgation of such gas rate by such authority the plaintiff shall on the fifteenth day of August, 1920, and on the fifteenth day of each succeeding month, pay to Richard Welling, Esq. (who is hereby appointed special master for that pur-
208 pose), out of all moneys collected by it for sale of gas in the City of New York all sums in excess of eighty cents. And it is

(8) Further ordered, adjudged and decreed that the said special master shall deposit all moneys so paid to him, equally in accounts in his name as special master in the New York Trust Company, the United States Mortgage & Trust Company, and the Title Guarantee & Trust Company at such interest as he can best obtain, to be withdrawn therefrom only upon order of this court. And it is

(9) Further ordered, adjudged and decreed that the said special master shall hold said moneys until March first, 1921, or until the earlier promulgation of such rate, as aforesaid, and upon the earlier promulgation of such rate the said special master shall on order distribute the moneys so collected with accrued interest, in accordance with such rate as though the same had been in effect from the date of the entry of this decree; but if no such rate shall have been promulgated on or before March first, 1921, then he shall pay over the sums so collected with accrued interest to the plaintiff. The said special master in either case to retain therefrom his expenses and allowance when fixed by the court. And it is

(10) Further ordered, adjudged and decreed that instead of making any payment or part payment to said special master in cash hereinbefore required, the plaintiff may at its option deposit with said special master Liberty Bonds of the United States or any other bonds in which savings banks are authorized to invest under the laws of the State of New York of a market value at the time of such deposit equal to one hundred and three per cent of the payment or
209 part payment for which they are substituted; said bonds to be held by said special master subject to the provisions in this decree marked (9), both as to their principal and any interest accruing thereon during the period of his possession, said interest to be apportioned per diem. And whenever the market value (less sub-

sequently accrued interest) of such bonds shall be no more than the cash for which they are a substitute, the said special master is hereby directed to call upon the plaintiff to deposit with him additional bonds sufficient to make up one hundred and three per cent of such cash, and such deposit shall be a condition upon the further continuance of this injunction. And it is

(11) Further ordered, adjudged and decreed that the plaintiff may at any time withdraw on order any cash previously paid to the special master upon the deposit with said special master of such bonds to be held by him under the same terms as are applicable to the deposit of bonds in place of any original payment. And it is

(12) Further ordered, adjudged and decreed that instead of making any payment or part payment to said special master in cash hereinbefore required, the plaintiff may, at its option, file in court on order a surety bond in place of the same upon the following terms and conditions: All such bonds shall be executed by the plaintiff and by a surety company authorized to give bonds by the rules of this court. No surety company shall execute more than one bond and that in a sum no greater than $500,000. All bonds shall be conditioned in the payment of the sum in cash for which they are a substitute together with seven per cent thereon until the time of payment. All such bonds shall be further conditioned upon
210 the payment of the principal and interest thereof in accordance with the provisions of this decree marked (9) or of any future modification thereof, and shall contain a provision that the same shall continue valid notwithstanding any future extension by decree of the period hereinbefore mentioned within which a new rate may be promulgated, and notwithstanding any further extension of payment resulting from any stay during the pendency of any appeal herein, and any other modification of this decree or of any stay in particular. Such bonds in the aggregate shall not at any time exceed two-thirds of the total payments then required by the terms of this decree. And it is

(13) Further ordered, adjudged and decreed that the plaintiff may on order at any time withdraw any moneys previously paid to the said special master upon filing any surety bond drawn as hereinbefore described. And it is

(14) Further ordered, adjudged and decreed that the foregoing provisions of this decree marked (9), (10), (11), (12), and (13) shall apply to all moneys collected by the plaintiff between July 1, 1920, and August 5, 1920, under the temporary injunction heretofore issued herein by the statutory court on June 28, 1920. And it is

(15) Further ordered, adjudged and decreed that at any time while the injunction hereinbefore granted shall remain in force, any party hereto, including the successor in office of any of the defendants, may apply upon notice at the foot hereof to vacate, modify, or extend the foregoing injunction because of any change of circum-

stances since the entry hereof; or for any additional relief to which he or it may become entitled. And it is

211 (16) Further ordered, adjudged and decreed that the plaintiff do recover its costs and disbursements when duly taxed of the defendants to be borne equally upon them, and that the allowance and expenses of Abraham S. Gilbert, Esq., the special master appointed to hear and report herein, shall be fixed by the court upon motion made by any party hereto, or by the said special master, and shall be paid by the defendants equally, or upon their default, then out of the cash, bonds, or surety bonds hereinbefore described.

August 4, 1920.

LEARNED HAND,
U. S. D. J.

August 11th, 1920.

LEARNED HAND,
U. S. D. J.

U. S. District Court, S. D. of N. Y. Filed Aug. 11, 1920.

212 *Amended Stay.*

United States District Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; Lewis Nixon, Constituting the Public Service Commission of the State of New York, First District, and Edward Swann, District Attorney for the County of New York, Defendants.

This cause came on to be further heard at the August, 1920, Term of this court, and was argued by counsel, and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that the stay herein entered on the fourth day of August, 1920, be and the same hereby is amended so as to read as follows:

213 United States District Court, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; Lewis Nixon, Constituting the Public Service Commission of the State of New York, First District, and Edward Swann, District Attorney for the County of New York, Defendants.

This cause came on to be further heard at the July, 1920, Term of this court and was argued by counsel and thereupon, upon consideration thereof, it is

Ordered, adjudged and decreed that in case the defendants or any one of them shall within thirty days after the entry of final decree herein appeal therefrom to the Supreme Court of the United States, then and in that case the conditions imposed upon the continuance of the injunction in said decree shall continue until the determination of such appeal and the special master appointed in said decree shall not distribute the moneys or bonds collected by him until such determination, and the surety bonds if any given shall continue in
214 effect until the same time, notwithstanding any extension of time given to prosecute said appeal. And it is

Further ordered, adjudged and decreed that all moneys collected by, or bonds deposited with, said special master and the proceeds of any surety bonds filed herein, in accordance with such decree shall at all times be held subject to the order of this court upon mandate of the Supreme Court of the United States. And it is

Further ordered, adjudged and decreed that this order is made, and shall continue in effect, only upon the condition that the defendants, and each of them, shall perfect and prosecute any such appeal, and print and file the record and all necessary papers to that end, promptly and without delay; and in the event that the plaintiff is at any time of the opinion that the perfecting of such appeal, the filing of the record, briefs, or other papers, or the bringing on of the appeal for argument, is being unreasonably and unnecessarily delayed by the defendants or any of them, it may apply to this court, upon notice, for such a modification of this order or other action as may be warranted in the premises.

August 4, 1920.

LEARNED HAND,
U. S. D. J.

August 11th, 1920. LEARNED HAND,
U. S. D. J.

U. S. District Court, S. D. of N. Y. *U.* Filed Aug. 11, 1920.

215 District Court of the United States, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant-Appellant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York; Edward Swann, District Attorney of the County of New York, State of New York, and Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District, Defendants-Respondents.

Statement Pursuant to Equity Rule No. 75.

The complainant prosecutes this appeal from that portion of the final decree herein comprised in paragraphs 6 to 14 inclusive, and

raises only the question of the power of the Court to include in the final decree the provisions of said paragraphs. The questions so raised being only questions of law, it is not deemed necessary to recite at length the evidence taken in the case nor to include the same in this record. The evidence was taken before a Special Master appointed by the court and is comprised in 15,920 printed pages and more than one thousand exhibits. The defendants in this case have appealed to this Court from the whole of the final decree; and the entire record, comprising all the proceedings before the Special Master and all of the one thousand or more exhibits introduced at the trial, will be before this Court upon the appeal of the defendants.

For the purposes of the appeal of the complainant, Consolidated Gas Company of New York, it is sufficient to say that the complainant's evidence showed in great detail the amount and value of its property devoted to the manufacture and distribution of gas
216 in the City of New York, the cost of manufacturing and distributing such gas during the year 1918 and 1919, the cost actually, reasonably and necessarily paid for the materials going into the manufacture of such gas and for the wages of the labor employed in the production and distribution thereof, the amount of gas supplied, the amount realized from the sale thereof and the amount reasonably to be expected and allowed as a return upon the investment of the complainant in its property.

From this great mass of evidence, the Special Master made a detailed report, accompanied by an opinion, which is incorporated in this record; and the District Court, after a review of the Master's report, modified and affirmed the same, making the final decree, which is also included in this record.

As to some of the evidence produced by the complainant, the defendants took issue and sought to controvert it by their own evidence; as to many items there was either no substantial dispute or the defendants' evidence tended to substantiate that of the complainant.

The complainant believes that the findings and conclusions of the Special Master, as modified by the District Court on final decree, are amply sustained by the evidence. This is controverted by the defendants upon their appeal, but may be assumed for the purposes of this appeal by the complainant, which seeks to bring up for review only the questions:

1. Whether the District Court, after final hearing, having enjoined the enforcement of a statutory rate because confiscatory, may fix and prescribe as a condition of the injunction (*a*) a maximum rate pending appeal or pending the fixation of a new rate by the State or State agency; (*b*) the impounding of moneys collected in excess of the rate enjoined.

2. Whether the District Court may by such decree fix and prescribe that any rate that may in future be fixed by State authority shall be retroactive and shall be retroactively observed by the complainant.

217 For the review of these questions of law no further statement of the evidence is deemed necessary.

SHEARMAN & STERLING,
Solicitors for Complainant-Appellant.

55 Wall Street, New York City.

(Endorsed:) U. S. District Coprt, S. D. of N. Y. Filed Feb. 16, 1921.

Approved this day under Rule 75 (Sub *b*).

LEARNED HAND,
D. J.

February 23, 1921.

A copy of the within paper has been this day received at the office of the Corporation Counsel.
Feb. 16, 1921.

JOHN P. O'BRIEN,
Corporation Counsel.

Copy received Feb. 16, 1921.

W. W. CHAMBERS, Esq.,
Solicitors for Defendant Newton.

Copy received Feb. 17, 1921.

TERENCE FARLEY, Esq.,
Counsel for Public Service Commission, First District, State of New York.

218 District Court of the United States, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District, Defendants.

Complainant's Assignments of Error.

The complainant files the following assignments of error upon which it will rely upon its prosecution of its appeal in the above entitled cause from the decree made by this court on August 4, 1920, and from the amended decree made by said court in this cause on August 11, 1920.

1. The Court erred in making that portion of said amended final decree reading as follows:

"(6) Further ordered, adjudged and decreed as a condition of the continuance of the injunction hereinbefore granted, that until March first, 1921, or until the earlier promulgation of a gas-rate applicable to the plaintiff by some competent authority of the State of New York, the plaintiff shall neither charge nor collect for the sale of gas in the City of New York more than the sum of One Dollar and twenty cents per thousand cubic feet. And it is

"(7) Further ordered, adjudged and decreed as a further condition upon the continuance of said injunction that until March first, 1921, or until the earlier promulgation of such gas rate by
219 such authority the plaintiff shall on the fifteenth day of August, 1920, and on the fifteenth day of each succeeding month, pay to Richard Welling, Esq. (who is hereby appointed special master for that purpose), out of all moneys collected by it for sale of gas in the City of New York all sums in excess of eighty cents. And it is

"(8) Further ordered, adjudged and decreed that the said Special master shall deposit all moneys so paid to him, equally in accounts in his name as special master in the New York Trust Company, the United States Mortgage & Trust Company, and the Title Guarantee & Trust Company at such interest as he can best obtain, to be withdrawn therefrom only upon order of this court. And it is

"(9) Further ordered, adjudged and decreed that the said special master shall hold said moneys until March first, 1921, or until the earlier promulgation of such rate, as aforesaid, and upon the earlier promulgation of such rate the said special master shall on order distribute the moneys so collected with accrued interest, in accordance with such rate as though the same had been in effect from the date of the entry of this decree; but if no such rate shall have been promulgated on or before March first, 1921, then he shall pay over the sums so collected with accrued interest to the plaintiff. The said special master in either case to retain therefrom his expenses and allowance when fixed by the court. And it is

"(10) Further ordered, adjudged and decreed that instead of making any payment or part payment to said special master in cash hereinbefore required, the plaintiff may at its option deposit with said special master Liberty Bonds of the United States or any other bonds in which savings banks are authorized to invest under the laws of the State of New York of a market value at the time of such deposit equal to one hundred and three per cent. of the payment or part payment for which they are substituted; said bonds to be held by said special master subject to the provisions in this decree marked (9), both as to their principal and any interest accruing thereon
220 during the period of his possession, said interest to be apportioned per diem. And whenever the market value (less subsequently accrued interest) of such bonds shall be no more than the cash for which they are a substitute, the said special master is hereby directed to call upon the plaintiff to deposit with him additional bonds sufficient to make up one hundred and three per cent.

of such cash, and such deposit shall be a condition upon the further continuance of this injunction. And it is

"(11) Further ordered, adjudged and decreed that the plaintiff may at any time withdraw on order any cash previously paid to the special master upon the deposit with said special master of such bonds to be held by him under the same terms as are applicable to the deposit of bonds in place of any original payment. And it is

"(12) Further ordered, adjudged and decreed that instead of making any payment or part payment to said special master in cash hereinbefore required, the plaintiff may, at its option, file in court on order a surety bond in place of the same upon the following terms and conditions: All such bonds shall be executed by the plaintiff and by a surety company authorized to give bonds by the rules of this court. No surety company shall execute more than one bond and that in a sum no greater than $500,000. All bonds shall be conditioned in the payment of the sum in cash for which they are a substitute together with seven per cent. thereon until the time of payment. All such bonds shall be further conditioned upon the payment of the principal and interest thereof in accordance with the provisions of this decree marked (9) or of any future modification thereof, and shall contain a provision that the same shall continue valid notwithstanding any future extension by decree of the period hereinbefore mentioned within which a new rate may be promulgated and notwithstanding any further extension of payment result-
221 ing from any stay during the pendency of any appeal herein and an- other modification of this decree or of any stay in particular. Such bonds in the aggregate shall not at any time exceed two-thirds of the total payments then required by the terms of this decree. And it is.

"(13) Further ordered, adjudged and decreed that the plaintiff may on order at any time withdraw any moneys previously paid to the said special master upon filing any surety bond drawn as hereinbefore described. And it is

"(14) Further ordered, adjudged and decreed that the foregoing provisions of this decree marked (9), (10), (11), (12), and (13) shall apply to all moneys collected by the plaintiff between July 1, 1920, and August 5, 1920, under the temporary injunction heretofore issued herein by the statutory court on June 28, 1920."

SHEARMAN & STERLING,
Solicitors for Complainant.

55 Wall Street, New York City.

Endorsed. U. S. District Court, S. D. of N. Y. Filed Nov. 10, 1920.

222 District Court of the United States, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York; Edward Swann, as District Attorney of the County of New York; and Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District, Defendants.

Petition for Appeal and Allowance Thereof.

To the Honorable Learned Hand, District Judge and one of the Judges of the above-named court:

The above named complainant, Consolidated Gas Company of New York, feeling aggrieved by the decree rendered and entered in the above entitled cause on August 11, 1920, wherein and whereby among other things it was adjudged as follows:

"(6) Further ordered, adjudged and decreed, as a condition of the continuance of the injunction hereinbefore granted, that until March first, 1921, or until the earlier promulgation of a gas-rate applicable to the plaintiff by some competent authority of the State of New York, the plaintiff shall neither charge nor collect for the sale of gas in the City of New York more than the sum of One Dollar and twenty cents per thousand cubic feet. And it is

"(7) Further ordered, adjudged and decreed as a further condition upon the continuance of said injunction that until March first, 1921, or until the earlier promulgation of such gas rate by
223 such authority the plaintiff shall on the fifteenth day of August, 1920, and on the fifteenth day of each succeeding month, pay to Richard Welling, Esq. (who is hereby appointed special master for that purpose), out of all moneys collected by it for sale of gas in the City of New York all sums in excess of eighty cents. And it is

"(8) Further ordered, adjudged and decreed that the said special master shall deposit all moneys so paid to him, equally in accounts in his name as special master in the New York Trust Company, the United States Mortgage & Trust Company, and the Title Guarantee & Trust Company at such interest as he can best obtain, to be withdrawn therefrom only upon order of this court. And it is

"(9) Further ordered, adjudged and decreed that the said special master shall hold said moneys until March first, 1921, or until the earlier promulgation of such rate, as aforesaid, and upon the earlier promulgation of such rate the said special master shall on order distribute the moneys so collected with accrued interest, in accordance with such rate as though the same had been in effect from the date

of the entry of this decree; but if no such rate shall have been promulgated on or before March first, 1921, then he shall pay over the sums so collected with accrued interest to the plaintiff. The said special master in either case to retain therefrom his expenses and allowance when fixed by the court. And it is

"(10) Further ordered, adjudged and decreed that instead of making any payment or part payment to said special master in cash hereinbefore required, the plaintiff may at its option deposit with said special master Liberty Bonds of the United States or any other bonds in which savings banks are authorized to invest under the laws of the State of New York of a market value at the time of such deposit equal to one hundred and three per cent. of the payment or part payment for which they are substituted; said bonds to be held by said special master subject to the provisions in this decree marked (9), both as to their principal and any interest accruing thereon during the period of his possession, said interest to be apportioned per diem. And whenever the market value (less subsequently accrued interest) of such bonds shall be no more than the cash for which they are a substitute, the said special master is hereby
224 directed to call upon the plaintiff to deposit with him additional bonds sufficient to make up one hundred and three per cent. of such cash, and such deposit shall be a condition upon the further continuance of this injunction. And it is

"(11) Further ordered, adjudged and decreed that the plaintiff may at any time withdraw on order any cash previously paid to the special master upon the deposit with said special master of such bonds to be held by him under the same terms as are applicable to the deposit of bonds in place of any original payment. And it is

"(12) Further ordered, adjudged and decreed that instead of making any payment or part payment to said special master in cash hereinbefore required, the plaintiff may, at its option, file in court on order a surety bond in place of the same upon the following terms and conditions: All such bonds shall be executed by the plaintiff and by a surety company authorized to give bonds by the rules of this court. No surety company shall execute more than one bond and that in a sum no greater than $500,000. All bonds shall be conditioned in the payment of the sum in cash for which they are a substitute together with seven per cent. thereon until the time of payment. All such bonds shall be further conditioned upon the payment of the principal and interest thereof in accordance with the provisions of this decree marked (9) or of any future modification thereof, and shall contain a provision that the same shall continue valid notwithstanding any future extension by decree of the period hereinbefore mentioned within which a new rate may be promulgated, and notwithstanding any further extension of payment resulting from any stay during the pendency of any appeal herein, and any other modification of this decree or of any stay in particular. Such bonds in the aggregate shall not at any time exceed two-thirds

of the total payments then required by the terms of this decree. And it is

"(13) Further ordered, adjudged and decreed that the plaintiff may on order at any time withdraw any moneys previously paid to the said special master upon filing any surety bond drawn as hereinbefore described. And it is

"(14) Further ordered, adjudged and decree that the foregoing provisions of this decree marked (9), (10), (11), (12), and (13) shall apply to all moneys collected by the plaintiff between
225 July 1, 1920, and August 5, 1920, under the temporary injunction heretofore issued herein by the statutory court on June 28, 1920."

does hereby appeal from said decree to the Supreme Court of the United States for the reasons set forth in the assignments of error filed herewith, and prays that this appeal may be allowed and that citation be issued as provided by law and that a transcript of the record, proceedings and documents, upon which said decree was based, duly authenticated be sent to the Supreme Court of the United States under the rules of said court, in such cases, made and provided.

And your petitioner further prays that the proper order relating to the security to be required of it be made.

New York, November 10, 1920.

SHEARMAN & STERLING,
Solicitors for Complaintant.

55 Wall Street, New York City.

Appeal allowed upon giving bond as required by law for the sum of $500.

LEARNED HAND,
District Judge.

Endorsed: U. S. District Court. S. D. of N. Y. Filed Nov. 10, 1920.

226 National Surety Company Bond in the penal sum of $500 filed by Appellant, and approved J. M. Mayer, District Judge, on Nov. 10, 1920.

227 District Court of the United States, Southern District of New York.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney-General of the State of New York; Edward Swann, as District Attorney of the County of New York, State of New York, and Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District, Defendants.

United States of America, by the Honorable Learned Hand, one of the judges of the District Court of the United States for the Southern District of New York, to

Charles D. Newton, as Attorney-General of the State of New York;
Edward Swann, as District Attorney of the County of New York, State of New York;
Lewis Nixon, constituting the Public Service Commission of the State of New York for the First District,

Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the City of
228 Washington, District of Columbia, on the 10th day of December, A. D., 1920, pursuant to an order allowing an appeal filed and entered in the Clerk's office of the District Court of the United States for the Southern District of New York from a final decree signed, filed and entered on the 11th day of August, 1920 in that certain suit being in equity No. 15-358 wherein Consolidated Gas Company of New York is plaintiff and you are defendants, to show cause, if any there be, why the decree rendered against the said appellant as in said order allowing appeal mentioned should not be corrected and why justice should not be done to the parties in that behalf.

Witness: The Honorable Learned Hand, United States District Judge for the Southern District of New York, this 10 day of November, 1920, and of the independence of the United States the one hundred and forty-fifth.

LEARNED HAND,
U. S. District Judge for the Southern District of New York.

229 [Endorsed:] Index No. E. 15-358. Year 19—. District Court of U. S. Southern District of N. Y. Consolidated Gas Company of New York, Complainant, against Charles D. Newton, as Attorney General of the State of New York, et al., Defendants. Citation. Shearman & Sterling, Attorneys for Complainant, 55 Wall

Street, New York. A copy of the within paper has been this day received at the Office of the Corporation Counsel, Nov. 10, 1920. John P. O'Brien, Corporation Counsel. Copy of within paper received this 10th day of November, 1920. Wilber W. Chambers, Solicitor for Attorney-General. Copy received Nov. 10, 1920. Terence Farley, Counsel for Public Service Commission, First District, State of New York. U. S. District Court, filed Nov. 11, 1920.

230 UNITED STATES OF AMERICA,
Southern District of New York, ss:

CONSOLIDATED GAS COMPANY, Plaintiff in Error,

vs.

CHARLES D. NEWTON, as Attorney General of the State of New York, and Others, Defendants in Error.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter page 1 to 225 inclusive.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this seventeenth day of March, in the year of our Lord one thousand nine hundred and twenty-one and of the Independence of the said United States the one hundred and forty-fifth.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.

231 At a Stated Term of the District Court of the United States for the Southern District of New York, in the Second Circuit, Held in the Post Office Building, in the Borough of Manhattan, in the City, County, and State of New York, on the 7th Day of March, 1921.

Present: Hon. Julius M. Mayer, United States District Judge.

E. No. 15-358.

CONSOLIDATED GAS COMPANY OF NEW YORK, Complainant,

against

CHARLES D. NEWTON, as Attorney General of the State of New York; Lewis Nixon, Constituting the Public Service Commission of the State of New York for the First District, and Edward Swann, as District Attorney of the County of New York, Defendants.

Upon the annexed stipulation, dated February 25th, 1921, it is Ordered and decreed that the time of all of the parties within which to serve a precipe and make a return to the United States Supreme Court upon the appeals taken by the parties from the decrees of the District Court, Southern District of New York, entered in the Clerk's Office respectively on the 4th and 11th days of August, 1920, be extended to and including the 9th day of April, 1921.

J. M. MAYER,
United States District Judge.

A true copy.

[Seal District Court of the United States, Southern District of N. Y.]

ALEX. GILCHRIST, JR.,
Clerk.

[Endorsed:] District Court of the United States for the Southern District of New York. Consolidated Gas Company, Plaintiff in Error, vs. Charles D. Newton, as Attorney General of the State of New York, and others, Defendants in Error. Transcript of Record on Appeal.

Endorsed on cover: File No. 28,165. S. New York D. C. U. S. Term No. 808. Consolidated Gas Company of New York, appellant, vs. Charles D. Newton, attorney general of the State of New York, et al. Filed March 18th, 1921. File No. 28,165.